P.V. 136 700472 Sept. Term

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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1945

## No. 349

GILBERT E. THIEL, PETITIONER,

*vs.*

SOUTHERN PACIFIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 20, 1945.

CERTIORARI GRANTED JANUARY 14, 1946.

8

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[fol. 1-13]

**IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

No. 21780-S

GILBERT E. THIEL, Plaintiff and Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Appellee

STIPULATION AS TO TRANSCRIPT OF RECORD ON APPEAL.—Filed September 2, 1943

In respect of the record on any appeal from the judgment entered herein on March 25, 1943, it is hereby stipulated by and between the parties hereto, through their respective counsel, as follows:

1. The above entitled action was commenced in the Superior Court of the State of California, in and for the City and County of San Francisco, and was thereafter removed by defendant Southern Pacific Company into the United States District Court, for the Northern District of California, Southern Division. Thereafter, in said action, certain proceedings were had in said District Court with respect to said removal, motions to remand were made and denied, and said District Court duly made, entered and filed its decree restraining and enjoining any further steps or proceedings in said action in said State Court. An appeal was taken by plaintiff from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, said matter being entitled "Gilbert E. Thiel, Appellant, vs. Southern Pacific Company, a corporation, Appellee," and numbered on the records of said Circuit Court of Appeals No. 9012. A judgment of said Circuit Court of Appeals affirmed said [fol. 14] decree. Plaintiff made application to the Supreme Court of the United States for a writ of certiorari to review said judgment of affirmance and said application was denied. Thereafter the mandate of said Supreme Court of the United States showing denial of said petition for certiorari was issued and filed with the records of said Circuit

Court of Appeals in said proceeding No. 9912 and spread upon the minutes of said court. Thereafter the mandate of said Circuit Court of Appeals showing affirmance of said decree of the District Court and that the cause had been properly removed into said court was issued and filed with the records of the above entitled cause in the said and above entitled District Court and spread upon the minutes thereof. The record and proceedings with respect to said removal, motions to remand, decree granting injunction and appeal therefrom, and other matters above referred to, may be omitted from the transcript of record on this appeal, and any Court to which said appeal may go may look to its own record on said prior appeal (being matter No. 9912 in the said Circuit Court of Appeals), the same shall be deemed a part of this record without setting the same forth herein at length, and either party to this appeal and any Court to which this appeal may go may refer to said records and proceedings on file as part of the record herein as though [fol. 15] set forth at length in the transcript of record herein.

. . . . . .

[fols. 16-17] Dated: August 31, 1943.

Allen Spivock, Attorney for Plaintiff, Arthur B. Dunne, Dunne & Dunne, Attorneys for Defendants, Southern Pacific Company.

The foregoing stipulation is approved and it is ordered accordingly.

Sept. 2nd, 1943.

A. F. St. Sure, District Judge.

[File endorsement omitted.]

[fol. 18] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

GILBERT E. THIEL, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, First Doe, Second Doe and Third Doe, Defendants.

No. 299469

COMPLAINT FOR DAMAGES—Filed December 30, 1940

(Personal injuries)

Plaintiff complains of above defendants and alleges:

I

That plaintiff does not know the true names of defendants sued herein as "Does" and prays leave to insert same when ascertained.

II

That at all times mentioned herein said defendant Southern Pacific Company was and now is a corporation, duly organized under the laws of the State of Kentucky, having [fol. 19] a place of business and doing business in said City and County of San Francisco, and was operating a railroad which was engaged in the business of carrying passengers from Reno, Nevada to San Francisco, California, operating same as a public carrier.

III

That on or about February 25, 1940 and in said Reno, Nevada, plaintiff purchased a ticket from said defendant Company to take him by train to said San Francisco, California.

IV

That at said time and shortly thereafter, said defendant Company was informed thru one of its regularly uniformed special police officers and by other of its agents that plaintiff was not then in his normal mind by reason of excessive and continued drinking of alcoholic liquors and that plaintiff should not be taken as a passenger or else should be guarded on his said proposed trip to San

Francisco as plaintiff was in a highly depressed mental state over his marriage of a week before in said Reno and he might do something rash; that thereupon said special officer remained with plaintiff on the train for some time but then, acting in a careless and reckless manner, left him alone and unguarded before said train started for said San Francisco.

V

That on or about 8:30 P. M. of said date and while said train was in motion at or near the boundary line between [fol. 20] the State of Nevada and the State of California, plaintiff, while out of his normal mind and in said highly depressed mental state, suddenly opened the window of said train and leaping out, held on to said window sill with his hands for some time before falling to the ground; that one of defendant Company's regular conductors on said train saw plaintiff hanging from said window but negligently and carelessly failed to give the stop signal until after plaintiff had fallen to the ground.

VI

That said fall was caused by the careless and reckless conduct of said defendants who, with full knowledge of plaintiff's said condition, accepted him as a passenger and then carelessly and recklessly failed to take any reasonable precautions for his safety.

VII

That upon falling from said train, plaintiff's legs got under the wheels thereof and as a result of said fall plaintiff now has his right leg amputated above the knee, his left leg amputated below the knee and his left arm so badly mangled that he will never have the normal use of it; that plaintiff has been in several hospitals and has had about ten operations and is now in a cast from his neck to his waist and will so remain for at least several months; that plaintiff has suffered the greatest conceivable pain and agony since said accident and will continue to so suffer for the rest of his life.

[fol. 21]

VIII

That at the time of said accident, plaintiff was 28 years of age, in good health and without any physical defects

and was employed as a salesman and was earning about $200.00 per month; that plaintiff will not be able to do any work for some time to come, if ever; that plaintiff has incurred hospital, doctor, nursing, and such bills and is daily incurring more of same and hereby prays leave to insert the exact amounts later.

IX

That as a result of all of the above, plaintiff has been damaged in the total sum of $250,000.00, no part of which has been paid.

Wherefore, plaintiff prays judgment against said defendants in the sum of $250,000.00 with costs of suit and general and equitable relief.

Allen Spivock, Attorney for Plaintiff.

[fol. 22] *Duly sworn to by Allen Spivock. Jurat omitted in printing.*

[File endorsement omitted.]

---

[fol. 23] IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT, SOUTHERN PACIFIC COMPANY—Filed February 24, 1941

Comes now Southern Pacific Company, a corporation, defendant above named, and answering Plaintiff's Complaint, herein shows:

I

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments, and each of them, of Paragraph III of said Complaint.

II

Denies each and every, all and singular, conjunctively, and disjunctively, the allegations of Paragraph IV of said Complaint, except defendant admits that one of its railroad policemen at Reno, Nevada, was informed on February 25, 1940, and prior to the departure from Reno, Nevada, of the train on which plaintiff rode, that plaintiff had been

drinking alcoholic beverage, and admits that it was a fact that he had been so drinking.

III

At or about 9:15 p.m. on February 25, 1940, plaintiff was on a train of defendant, which was running to Oakland, California, from Reno, Nevada. At or about said time, and at a point west of Verdi, Nevada and east of Truckee, California, and near the California-Nevada boundary line, plaintiff suddenly opened a window of said train and leaped [fol. 24] out said window of said train and fell to the ground below. Said train was moving at said time. By reason of said leap and fall, plaintiff was injured. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of said complaint, and each of them, as follows: as to plaintiff's sanity and psychological and mental state; that after leaping through the window of said train, plaintiff held on to the window sill with his hands for some time before falling to the ground. Avers that defendant's conductor on said train saw plaintiff when plaintiff was partially through said window. Denies each and every, all and singular, conjunctively and disjunctively the remaining allegations of Paragraph V of said complaint.

IV

Denies each and every, all and singular, conjunctively and disjunctively, the allegations of Paragraph VI of said complaint.

V

Defendant is informed and believes, and therefore avers that plaintiff was seriously injured as a result of said leap from said train, but is without knowledge or information sufficient to form a belief as to the truth of the averments, and each of them, of said complaint, as to the extent of and exact nature of the injuries sustained by plaintiff and as to the remaining allegations of Paragraph VII of said complaint.

[fol. 25]

VI

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments, and each of them, of Paragraph VIII of said complaint.

VII

Denies each and every, all and singular, conjunctively and disjunctively, the allegations of Paragraph IX of said complaint.

As and For a Second, Separate and Distinct Defense to Plaintiff's Complaint Herein, Defendant Southern Pacific Company, shows as follows:

I

On or about February 25, 1940, plaintiff was on one of defendant's trains. Said train was being operated at said time from Reno, Nevada, to Oakland, California. Prior to the time plaintiff boarded said train and at all of the time on February 25, 1940, while plaintiff was on said train, plaintiff so negligently, carelessly, recklessly, wilfully and wantonly conducted himself as to proximately cause and contribute to any and all of said injuries alleged to have been received by him and also while said train was in motion, and when said train was between Verdi, Nevada, and Truckee, California, plaintiff negligently leaped from said moving train, and thereby caused and contributed to any injury alleged to have been received by him.

[fol. 26] And As and For a Third, Separate and Distinct Defense to Plaintiff's Complaint Herein, Defendant Southern Pacific Company shows as follows:

I

On or about February 25, 1940, plaintiff was on one of defendant's trains. Said train was being operated at said time from Reno, Nevada, to Oakland, California. While said train was in motion, and when said train was at a point between Verdi, Nevada, and Truckee, California, plaintiff leaped from said moving train and thereby received any injury alleged to have been received by him.

II

Defendant is informed and believes, and therefore alleges that at said time and on said occasion plaintiff was in an abnormal psychological and mental state; that plaintiff so negligently, carelessly, recklessly, wilfully and wantonly conducted himself on said date of February 25, 1940, and

during a period of approximately one week prior thereto as to cause said mental condition and as to proximately cause and contribute to any and all of the injuries alleged to have been received by him.

And As and For a Fourth, Separate and Distinct Defense to Plaintiff's Complaint Herein, Defendant Southern Pacific Company shows:

I

On or about February 25, 1940, plaintiff was on one [fol. 27] of defendant's trains. Said train was being operated at said time from Reno, Nevada to Oakland, California. While said train was in motion, and when said train was at a point between Verdi, Nevada, and Truckee, California, plaintiff leaped from said moving train and was thereby injured.

II

Any and all of said injuries were proximately caused by plaintiff's own independent, voluntary and wilful act in so leaping from said moving train.

And As and For a Fifth Separate and Distinct Defense to Plaintiff's Complaint Herein, Defendant Southern Pacific Company, shows as follows:

I

On or about February 25, 1940, plaintiff was on one of defendant's trains. Said train was being operated at said time from Reno, Nevada, to Oakland, California. While said train was in motion and when said train was at a point between Verdi, Nevada, and Truckee, California, plaintiff leaped from said moving train and was thereby injured.

II

At all times on February 25, 1940, plaintiff was in the company of his wife, Billie Brown Thiel, and/or one J. A. Morris. At all of said times plaintiff had submitted himself into the care and custody of his said wife and said Morris. At all of said times plaintiff's said wife and said Morris so [fol. 28] negligently, carelessly, recklessly, wilfully and wantonly conducted themselves as to proximately cause and contribute to any and all of the injuries alleged to have been received by plaintiff.

Wherefore, defendant Southern Pacific Company prays that plaintiff take nothing by reason of his complaint herein; that said defendant Southern Pacific Company have judgment for its costs herein, and that plaintiff be sent hence without day, and for such other different and further relief as, the premises considered, shall be fitting and proper.

A. B. Dunne, Dunne & Dunne, Attorneys for Defendant Southern Pacific Company.

Admission of Service.

[File endorsement omitted.]

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[fols. 29-57] In United States District Court

Demand for Jury Trial—Filed March 5, 1941

Plaintiff, Gilbert. E. Thiel, hereby demands a trial by jury in the above action.

(Without waiver of right to move for remand to state court.)

Dated: March 4, 1941.

Allen Spivock, Attorney for Plaintiff.

(Receipt of Service.)

[File endorsement omitted.]

---

[fol. 58] In United States District Court

Notice of Motion to Strike Out Entire Jury Panel, etc.—Filed November 5, 1942

To the Above Defendant and to Mr. A. B. Dunne, Its Attorney:

You Are Each Hereby Notified that plaintiff hereby challenges for cause the entire jury panel of this Court and on the 9th day of November, 1942 at 10:00 A. M. thereof, plaintiff will move the above Court, Hon. John C. Bowen thereof, in his courtroom at 7th & Mission Sts.,

San Francisco, California, for an order striking out or quashing the entire jury panel which was to be used for trial of this action and ordering the selection of a new panel on a basis of fair representation to all classes of wealth, occupation, sex and race, and by district representation, after investigation of prospective jurors to determine whether they are connected with or prejudiced in favor of such gigantic corporations as said defendant Southern Pacific Company which continually have litigation pending before this Court.

Said motion will be based upon all the papers, records, and files of this action and upon the Affidavit of Allen Spivock, filed herewith, and upon further affidavits and oral testimony to be offered by plaintiff, and upon the jury lists themselves and all the records and files of the Jury [fol. 59] Commissioner and Clerk of this Court and of the Jury Commissioner of the Superior Court of the State of California in and for the City and County of San Francisco.

Said motion will be made upon the following grounds:

1. That the judges of the above Court have failed to prescribe any rules of qualifications or otherwise for selection of said jury panel as required by law. 28 U. S. C. A. 411 and Calif. C. C. P. 204b.

2. That mostly business executives or those having the employer's viewpoint are purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes who constitute, by far, the great majority of citizens eligible for jury service; that prior to his accident sued upon herein, plaintiff was regularly employed as a wage earner; that by reason of the above plaintiff is being denied equal protection of the laws.

3. That a larger proportion of men jurors are purposely selected, thus discriminating against women jurors.

4. That the selection of said jurors is arbitrary because no examination whatever is made of said jurors before they are put on said panel to ascertain their qualifications or particularly their unfitness by reason of business or other connections with or prejudices in favor of such gigantic corporations as said defendant Southern Pacific Com-

pany which continually have litigation pending in this [fols. 60-61] Federal Court; that the judges of the above Court have failed to provide the necessary facilities or funds to permit proper investigation of prospective jurors as is done in the highest State Court and as is required by law; 28 U. S. C. A. 411 and Calif. C. C. P. 204c, 205.

5. That no effort is made to proportionately or fairly represent citizens of all races on said panel, thus systematically excluding Negroes and Chinese.

6. That no effort is made to apportion jurors by districts when selecting them as is required by law. 28 U. S. C. A. 413 and Calif. C. C. P. 206.

7. That by reason of the above administrative acts of said Jury Commissioner and said Clerk of this Court which may even appear fair on their face, said defendant Southern Pacific Company has been able to prevail in every personal injury action against it, tried by a jury in this Federal Court for the past nine years, and by reason of the above plaintiff has ample and sufficient reasons to fear that it will be impossible for him to obtain the unanimous 12 votes necessary even after it is shown that the evidence and law require a verdict in his favor; that unless this motion be granted, plaintiff will, in *substance and effect*, be denied his right to trial by an impartial jury as guaranteed to him by the Federal Constitution. (Norris v. Alabama, 294 U. S. 587, 589, (1935))

Dated: November 4, 1942.

Allen Spivock, Attorney for Plaintiff.

[fol. 62] [File endorsement omitted.]

[fol. 63] In United States District Court

Affidavit of Allen Spivock on Motion to Strike out Entire Jury Panel. Filed November 5, 1942

State of California,
City and County of San Francisco, ss.:

Allen Spivock, being first duly sworn, deposes and says: That he is the attorney for said plaintiff who seeks damages herein for personal injuries; that plaintiff is sadly crippled for life with both legs amputated and his

left arm immovable as a result of the accident sued upon herein, and he is wholly without funds and is living upon the charity of his relatives; that prior to said accident, he was regularly employed as a wage earner.

That on October 24, 1942 affiant spoke to the Clerk and Jury Commissioner of this Court about the method used in selecting the jury panel to be used for trial of this action which is now set for November 24, 1942; that both said Clerk and Jury Commissioner stated that no rules for the selection of jurors for said panel had ever been prescribed by the Judges of this Court; that, from the city directory and other lists, they select mostly business executives and business men because it is easiest to get them to serve; that labor and working people do not wish to serve as jurors because of loss of their employment time, and therefore no effort is now made to select them as [fol. 64] jurors; that men are mostly selected because they make better jurors and do not give way to sympathy as women do; that they try to get intelligent jurors but no effort is made to examine prospective jurors as to their qualifications before they are selected because insufficient facilities or funds are provided to do this in the way that the Jury Commissioner for the Superior Court of the State of California in and for the City and County of San Francisco does, and thus, it is impossible to check their qualifications or ascertain whether the prospective jurors have connections with or prejudices in favor of such gigantic corporations as said defendant Southern Pacific Company which continually have litigation pending in this Federal Court; that no effort is made to give proportionate or any fair representation on said panel to citizens of other races such as Negroes or Chinese; that no effort is made to obtain proportionate district representation as is done in said State Court; that no effort is made to equalize the business and employment of prospective jurors as is done by court rule in said State Court.

That affiant complained to said Jury Commissioner and Clerk that it is common talk among attorneys and others that a great majority of the jurors selected for this Court are, in various ways, connected with or prejudiced in favor of or so influenced as to favor said defendant Southern Pacific Company, and when affiant informed them that for many years past, all jury verdicts have favored said [fol. 65] Company in all personal injury cases, they ex-

pressed surprise and stated that they did not knowingly select any railroad employees as jurors.

That affiant has checked the records of this Court for the past nine years and finds that said defendant Southern Pacific Company has prevailed in every damage suit for personal injuries or accidental death against it where trial was by jury.

That verdicts for said defendant Company and final judgments thereon in its favor were entered in the following cases asking damages for personal injuries or accidental death:

1. Heath v. Southern Pacific Co., No. 19493 herein, on Oct. 16, 1933.
2. Noonque v. S. P. Co., No. 19496.
3. Kennedy v. S. P. Co., No. 19537.
4. Winton v. S. P. Co., No. 19758.
5. Ericksen v. S. P. Co., No. 19823.
6. Griffin v. S. P. Co., No. 20183.
7. Moore v. S. P. Co., No. 20190.
8. Pilarski v. S. P. Co., No. 20193.
9. Kurtz v. S. P. Co., No. 20216.
10. Merritt v. S. P. Co., No. 20238.
11. Tilford v. S. P. Co., No. 21267. Directed verdict on Feb. 13, 1941.)
12. Borges v. S. P. Co., No. 21346, on July 31, 1941.
13. Tierney v. S. P. Co., No. 21446, on May 23, 1939.

[fol. 66] That the same method of selection of jurors in the above actions was used in the selection of the panel for trial of this action.

That during the past week already 5 of the attorneys for the plaintiff in the above actions tried most recently have told affiant that the jurors in their respective actions were mainly business executives and business men and that altogether too many of them and too many of the other jurors were in some way connected with or subject to influence by said defendant Southern Pacific Company by reason of business, family or other connections, and that therefore, the plaintiff could not and did not obtain a fair verdict; that said attorneys believed that they would have received a favorable verdict if their said cases were tried in said State Court.

That affiant has spoken to numerous other San Francisco attorneys both recently and during the past few

years and the common, accepted and definite opinion among them is that it is practically impossible to obtain a jury verdict in a personal injury case against said Southern Pacific Company or such other gigantic corporations in this Federal Court and that this is primarily due to the manner of selection of jurors in this Court where mainly business executives are selected, whereas, in the State Court a fairer representation of jurors is chosen from all classes.

That in view of the above, attorneys for the plaintiffs in personal injury actions against said defendant company are most fearful of going to trial before a jury in [fol. 67] this Federal Court in cases where they believe a jury should try the facts and none of the many actions for personal injuries on file herein has gone to trial before a jury herein since said case of Borges v. S. P. Co., No. 21346 on July 31, 1941; that within the past few weeks the attorney for the plaintiff in Hubner v. S. P. Co., No. 22107 herein, gladly paid the heavy penalty of some $272.00 merely to obtain a dismissal of said case here so he could file it in the State Court because he was so firmly convinced from actual past experience that said plaintiff could not get a jury verdict in this Court even tho the evidence so warranted.

That with full knowledge of all the above, said defendant Southern Pacific Company has made it a common and regular practice to use every effort to transfer all personal injury actions from said State Court to this Federal Court in order to take the fullest advantage of the above unfair situation.

That plaintiff's action here is of the greatest importance to him as in his seriously crippled condition it is almost a matter of life and death to him whether he prevails here and it would be most unfair and unjust and a deprivation of plaintiff's constitutional rights to force him to present his case before a jury to be selected from said present panel drawn for this case, as such a jury would not give him a fair and impartial trial.

That plaintiff's right to trial by jury is a most important one, especially in this case where the facts are [fol. 68] most unusual and evidence will be sharply conflicting and a fair minded jury may give due consideration to humanitarian as well as strictly legal principles.

Wherefore, affiant prays that said jury panel be stricken out or quashed and that this Court order the selection of a new panel on the basis of fair representation to all classes and by district apportionment.

Allen Spivock.

Subscribed and sworn to before me this 4th day of November, 1942. Sol Peiser, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

(Receipt of service.)

[File endorsement omitted.]

[fol. 69] In United States District Court

[Title omitted]

**Transcript of Hearing on Motion to Strike Out Entire Jury Panel** – Filed November 3, 1943

Monday, November 9, 1942.

Counsel Appearing:

For Plaintiff: Allen Spivock, Esq.

For Defendant: Arthur Dunne, Esq.

Mr. Dunne: I would like to object to the introduction of any evidence on the ground that the grounds stated in the motion are insufficient as a matter of law; that on their face they do not show any purposeful, systematic or arbitrary exclusion of any member of a particular class because he is a member of that class. Also, because a reference is made, we object to any consideration of the affidavit of counsel as evidence in this matter before your Honor, first, upon the ground that as to the first paragraph the matter is immaterial, irrelevant, and incompetent, and has no reference whatsoever to the selection of jurors here; secondly, as to the balance of the recitals of that affidavit upon the ground that it is apparent on its face that it is [fol. 70] hearsay; and, third, as to the reference to what has happened in other cases that have been tried here is immaterial, irrelevant, and incompetent, and injecting into this a wholly collateral issue which has no bearing on the

question of selection of jurors, which, if the moving papers are sufficient, is the only question that is properly before your Honor.

I simply for the purpose of the record make that objection. Would it be sufficient if the Court reserved a ruling on that?

The Court: I wish to say to both sides that the Court desires a full and complete hearing of all of the evidence on this question, and I will rule upon whether or not the Court should hear it after it is all in. I wish both sides to have the opportunity of producing all evidence that they feel is material on the plaintiff's charge that there was a discrimination here in the selection of the jurors who were qualified.

VINCENT W. HALLINAN, called for the plaintiff; sworn.

Mr. Spivock:

Q. Mr. Hallinan, what is your business?
A. I am an attorney at law.
Q. Admitted to practice in all of the State courts?
A. That is correct.
Q. And also in the United States District Court?
A. Yes.
Q. How many years have you practiced?
A. 22 years.
Q. Have you tried a great many personal injury cases with juries?
A. Yes.
Q. And you have had a fair degree of professional service?
A. At least fair.

[fol. 71] Q. You have tried the case of Harry W. Kurtz v. Southern Pacific Company, No. 20216 in the records of this court, have you?
A. That is right.
Q. You represented the plaintiff?
A. Yes.
Q. The verdict in that case was for the defendant?
A. That is right.
Q. In the selection of the jurors, or in receiving jurors for the trial did you have any difficulty in obtaining jurors who were not connected with the Southern Pacific Company?

Mr. Dunne: That is objected to as immaterial, irrelevant, and incompetent, not within any issue in this case. What difficulty counsel may have had in the trial is entirely immaterial.

Mr. Spivock: We are making the charge here in substance and effect that plaintiffs have been denied an impartial jury, and as proof of that fact we are showing a series of previous cases where other cases have had difficulty in getting a jury that was not in any way connected with the Southern Pacific Company.

The Court: The objection is overruled.

Mr. Dunne: May I add to the objection that it also calls for the opinion and conclusion of the witness?

The Court: The objection is considered and the objection is overruled.

A. The jury in that case was a typical Federal court jury, the type of jury that is here all the time, selected almost exclusively from business executives, wealthy persons: no such thing as a workingman has appeared on the jury, or workingmen's wives, I did not see any in that case; I have never seen the wife of a workingman or the [fol. 72] workingman, himself, on a jury, and in that particular case, if my recollection serves me correctly, there were four people of the persons interrogated on the voir dire who were connected in some way with the Southern Pacific Company, itself. One, I knew was an officer of the Southern Pacific, my impression is two were, and my impression is that two others either had worked for the Southern Pacific Company or had relatives working for the Southern Pacific Company, and the rest of the jurors were persons of the type that it would be almost impossible for the plaintiff in a personal injury case to obtain a verdict.

Mr. Dunne: I move to strike that out as not responsive to the question, as involving an opinion and conclusion.

Mr. Spivock: If your Honor please, the witness is an expert, he has qualified as an expert, and he is entitled to give an opinion in this matter.

The Court: The motion is denied.

Mr. Spivock:

Q. Then it is your definite impression, from the Kurtz v. Southern Pacific Company trial that in the jurors who

were present there on the jury panel there was none who could be classed as a wage earner?

A. None.

Mr. Dunne: For the purpose of the record, that the objection heretofore made to this line of inquiry is that it is immaterial, irrelevant, and incompetent, does not point to any issue which is submitted to your Honor, which is the matter of the method of the selection of a jury, that it calls for the opinion and conclusion of the witness, and is going into a collateral matter, and whatever a particular panel may have been in a particular case has no relevancy [fol. 73] so far as the manner and method of selection of the jury is concerned, and the question of arbitrary exclusion of the laboring class is concerned. May we have that objection pursue this line of inquiry, as well as the fact that any testimony as to the occupation or connection of a particular person is obviously hearsay.

The Court: Counsel for Plaintiff, have you any objection to that? In other words, Counsel for Defendant desires to have an objection running to all this line of inquiry without repeating it.

Mr. Spivock: I have no objection to counsel having the objection without repeating it. I will agree to that.

The Court: The Court approves it. The objection is overruled.

Mr. Spivock:

Q. In other words, there were no wage earners on that particular jury panel that came before you for trial jurors to be selected from?

A. None that I can remember. My impression is that there were not any.

Q. And the occupations of the others, do you remember particularly what they were?

A. I can't remember them definitely. The panels in the Federal court and the consistency of that jury was typical. The jury is selected almost entirely from business people, executives, persons of that type.

Q. The other jury cases that you have tried up there, personal injury cases, have you won those cases?

A. No.

Q. There was a verdict for the defendant in each case?

A. That is right.

Q. In all of those cases that you tried, did you feel that if you tried the same case before a jury in a State court you would have won the case?

A. Yes.

[fol. 74] Mr. Dunne: That is objectionable beyond the other objection I made.

The Court: That objection will be sustained.

The Witness: I might say, as to the merits of that Kurtz v. Southern Pacific Company case——

Mr. Dunne: If your Honor please, are we going into the merits of that case?

The Court: Do you wish to respond to that objection, Counsel?

Mr. Spivock: I might ask one question and dispose of it.

Q. Mr. Hallinan, did you feel that the evidence warranted a verdict in favor of the plaintiff in that case?

Mr. Dunne: I object to that.

A. Emphatically, especially in the Kurtz case, it was a very clear case for the plaintiff. As the case started I was a little dubious about the evidence, but the evidence produced by defendant, and especially records we got into evidence, coming out of the company's records, seemed to me to establish conclusively a case. The jury was out for an hour and I would have bet any of the boys that the jury was going to bring a verdict in for the plaintiff; and was astonished when they brought in a verdict for the defendant.

Q. You lost the case?

A. Yes.

Q. You also appeared as attorney for the plaintiff in the case of Hubner v. Southern Pacific Company?

A. Yes.

Q. You made a motion in the Federal court for leave to dismiss in order that you might file that case in the State court?

A. Yes.

Mr. Dunne: I object to that.

[fol. 75] Mr. Spivock:

Q. When you made that motion was it granted?

A. Yes, it was granted conditionally. I had not filed the case originally, but it was filed by another counsel in the State court. The case was transferred into the Federal court and then the attorney who brought the case entered the Army, the case was turned over to me, and I did not see that the case could be remanded, there was no ground for remanding, so I moved to dismiss the case for the purpose of filing in the State court, Judge St. Sure made a conditional order that the case would be dismissed without prejudice if we would pay $250 counsel fees and the costs of the case. I wrote a letter to my client, and this is before I even heard of your matter at all: I have the copy of the letter here, and I said to her substantially what this situation was. The man worked in a shipyard, they are not rich people, and he did not want to spend money unless necessary, and I said, "I believe that at least in Dolores' case we have a very good chance of recovering a judgment against the Southern Pacific Company in a State court." Dolores was a little girl who was riding with her mother at the time of the collision. I said, "But I would have no hope of recovering a judgment in the Federal court, and I believe that the best thing to do would be to pay them the $271.50 and file an action in the State court. It is unfortunate that this condition has arisen, but it is due to the fact that the operators of the train were not sued in the original action and the case could not be maintained in the State court. Please advise me at once as to your desire in this matter. If you do not care to pay the $271.50, I may be able to get the Court to change its order so as to [fol. 76] not dismiss the case with prejudice and it still would remain in the Federal court. However, I would not care to try it, myself, in that jurisdiction, as I believe that the juries in the Federal court are so selected that they always will favor the Southern Pacific Company, and that it is almost impossible to win a verdict against them there." I wrote that letter on October 20, 1942.

Q. That was long before anyone spoke to you about this case, at all?

A. Yes, and the people put up $271.50, which was paid to Mr. Dunne, and filed a case in San Mateo County, naming the conductor, engineer and fireman of the train.

Q. This $271 was paid how long ago?

A. That was paid just a few days ago, and I had an agreement with the people that they were to pay the costs in that case, and I agreed with them if they would pay $271.50 to get the case out of the Federal court I would pay the costs in the State court, because they could not afford to pay both.

Q. Are there any reasons you have other than those set forth in your letter why you would pay $271.50 to have the case dismissed and go to the State court?

A. If I were trying a case in the Federal court I would not take a jury under any circumstances, in a damage case, any more. The difficulty of winning those cases before judges is known to everyone, but you have a much better chance with a judge in the Federal court than with a jury. The jury is so constituted that it seems to be prejudiced, that they have a conviction against cases of this kind; people of that caliber won't give damages to injured persons. A somewhat similar problem arose some years ago in the City and County of San Francisco.

[fol. 77] Mr. Dunne: If your Honor please, we are not comparing it with the difficulties in the State court.

The Court: That objection is sustained. Proceed by question and answer.

Mr. Spivock:

Q. Are there any other reasons that you have for paying that penalty rather than proceed in the Federal court?

A. No other reason than——

Q. (Interrupting:) That is, other than you have already mentioned?

A. Except the conviction that trying a case before a jury in the Federal court would be a waste of time and effort.

Q. And money?

A. Yes, it would be thrown away.

Q. Have you had occasion to check on the number of wage earners in San Francisco?

A. I did that in 1937, that is, in proportion to the other persons. At the time I secured from the Building Trades Council the estimate that there were 40,000——

Mr. Dunne: Just a minute, I think as a result of that inquiry with regard to the number of wage earners in San

Francisco in proportion to the others, that is objected to as calling for hearsay.

The Court: Do you have the basis of that estimate?

A. Yes.

Q. Is it a written report of some kind?

A. No, this is an affidavit I made which was based upon the estimate secured from the Building Trades Council.

Q. Was that taken from records of the Council?

A. Yes. They had 40,000——

The Court: The objection is overruled.

A. 40,000 persons who were members of the allied building trades, and 60,000 laborers and skilled mechanics outside of the building trades, so they had a hundred thousand [fol. 78] hired men. The population of the city at that time was about 635,000, and taking merely all the laboring classes as against the other persons whose records I also got from insurance people, etc., about three-quarters of the population of the city were either working people or members of their families.

Mr. Spivock: I believe that is all.

The Court: Any cross-examination?

Cross-examination.

Mr. Dunne:

Q. Mr. Hallinan, you did not make a motion for a new trial in the Kurtz case, did you?

A. No, I lost it on the trial, the way it went, I would have despaired of winning it in the same court before another jury.

Q. Do you remember the names of any persons on that jury?

A. No.

Q. Do you remember who you described as an officer?

A. I do not.

Q. Do you remember who anybody else on that jury was?

A. Their names now?

Q. Yes.

A. That is some years ago. I have tried perhaps a hundred cases since then.

Q. Or the business of any of them?

A. I couldn't remember that.

Q. Or the business of anybody else on the panel from which the jury was finally selected?

A. No, I couldn't remember.

Q. Or even whether you exhausted all your peremptory challenges?

A. I don't know that.

Mr. Dunne: No further questions.

Mr. Spivock: May this witness be excused so he can return to *this* business?

The Court: Does counsel object to this witness being excused now?

Mr. Dunne: No, he may be excused.

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[fol. 79] CLIFTON HILDEBRAND, called for the plaintiff; sworn.

Mr. Spivock:

Q. Mr. Hildebrand, you are admitted to the practice of law in all of the courts of the State of California?

A. Yes.

Q. For how many years?

A. About twenty years.

Q. You are also admitted to practice in the United States District Court over that period of time?

A. Yes.

Q. You have recently tried—that is, not recently, but a few years ago tried the case of Merritt v. Southern Pacific Company, No. 20,238, in the files of this court?

A. Yes.

Q. And there was a verdict for the defendant in that case?

A. Yes.

Q. Did you feel from the evidence presented on its merits that you should have won that case?

Mr. Dunne: May I repeat and have the same objection pursue this line of inquiry?

The Court: Yes; the objection is overruled.

A. Yes. Might I explain that this was a passenger case, and the passenger was injured on the premises of the company, and it was a type of case that ordinarily there would be no question of a recovery on.

Mr. Spivock:

Q. You feel that you could have won that case?

A. Yes.

Q. Did you notice the type of people on the jury panel that was presented to you?

A. Yes.

Q. Will you describe what you noticed as to their occupation?

A. Well, it was a typical jury in this Federal court, they were all big business men, contractors, insurance company [fol. 80] executives, practically all of them from California street or Sansome street, hardly any of them from the humble walks of life, no laboring people, at all.

Q. Were there any women on that jury.

A. No.

Q. There were no women, at all?

A. No.

Q. There were no wage earners or working class people on that panel, at all?

A. None. There might have been a clerk, but I am not sure. I tried many cases in the Federal court here and I do not recall of having anybody from any of the laboring class, like carpenters or their wives, or bricklayers, or shoe clerks, store clerks, nobody at all from any of those, no one except business executives with an occasional clerk, perhaps, from some of their offices.

Q. In the cases where you have found a clerk on the jury it has always been from one of the big corporations?

A. That is my recollection of it, some tied in with the Southern Pacific, or some insurance company, or a railroad.

Q. You have also tried a great many personal injury cases in the State court?

A. Yes.

Q. And you have had a fair degree of good success in those cases?

A. Yes.

Q. About how many cases have you tried, personal injury cases have you tried in the Federal court?

A. I used to try a great many under the Federal Employers' Liability Act. I represented some of the Railroad Brotherhood and over a period of years I have tried quite a few; I would say probably twenty-five.

[fol. 81] Q. Directing your attention particularly to the past ten years to bring it within recent history, have you won any jury verdicts in those cases in the Federal courts?

A. Yes, we got $1000 in one case where the damages were about $6000 against the Southern Pacific Company, and the judge promptly granted a new trial for inadequacy of the damages.

Q. However, that was more than nine years ago, was it not?

A. Well, it was nine or ten years ago, something like that; it might have been a little longer.

Q. Was there any case within the past eight or nine years, let us say, where you have secured a jury verdict?

A. No, I do not recall any.

Q. How many jury verdicts have been returned for plaintiffs you represented?

A. I think two. I finally had to stop trying them.

Q. What was your reason?

A. I did not think we could get a fair trial for the kind of people I represented, laboring people and members of the Railroad Brotherhood who were injured while employed by the railroad, and seamen's injuries. I found that we did not get a fair trial, in my opinion, with big business men judging their rights, insurance men and big executives; that the same cases that could be won in the State court would be lost in the Federal court.

Q. Then is it your present opinion that you would not care to try any person- injury case in the Federal court at the present time with the present jury set-up?

A. Not unless I absolutely had to.

Q. You think it is almost impossible to win?

A. Yes, I do, unless it is just an open and shut case. If it is an open and shut case I think the Federal jury will [fol. 82] sometimes give more than the State juries. That is the only exception that I would make.

Q. However, in the average case, where there is always some doubt involved, you feel that the jury will always favor the defendant?

A. Yes, if they can find any possible reason they will go for the defendant, in my experience.

Q. Have you had occasion to check the number of working people in Alameda County?

A. Yes. I am the attorney for the Building Trades Council, and I am also attorney for many of the Railroad Brotherhoods, and I know approximately what their membership is.

Q. What would you say their membership is in Alameda County?

A. The Building Trades mechanics in Alameda County have a membership of about 40,000, and with the influx of the shipyard workers there are about 30,000 or 40,000 additional who are not affiliated directly, or who have just an indirect affiliation, so there are about 70,000 building trades mechanics working in Alameda County at the present time; there are about 50,000 in the Central Labor Council, and there are about 25,000 employees operating with the different railroad brotherhoods, and with their families they constitute fully 85 per cent of the population of some 300,000.

Mr. Spivock: That is all.

The Court: Any questions, Mr. Dunne?

Cross-examination.

Mr. Dunne:

Q. Mr. Hildebrand, you did not try the Miller case, yourself, did you?

A. Well, I was in and out. Mr. Sykes was associated with me on it, and it was my responsibility. I think Mr. Sykes did most of the work. I was in and out there, and saw the jury selected.

[fol. 83] Q. That was a case where a woman slipped on the floor?

A. On a bottle of whisky.

Q. At the Ferry Building?

A. Inside of the premises of the company.

Q. That is premises rented by the company?

A. Yes.

Q. Where a stranger had left a bottle of whisky?

A. Yes, it was being cleaned up and she had not been warned about its being there.

Q. And the janitor was in the process of cleaning it up at that time?

A. Yes, and was standing right there and did not warn the lady.

Q. Do you recall any particular juror on that panel?

A. Yes, there were insurance men from some company, some executives.

Q. Anybody else that you remember?

A. Yes, there was some big importer who did business with the railroad.

Q. Anybody else?

A. There were three or four other big business men and a retired high Army officer.

Q. Anybody else that you recall?

A. There were certainly no labor people from Alameda County or San Francisco County on the jury, or on the panel.

Q. Did you make an investigation of that panel?

A. Yes, I made an investigation of everyone whenever I tried a case out here.

Q. No motion for a new trial in that case was made?

A. I would not remember that.

Mr. Dunne: I have no further questions.

Mr. Spivock: That is all. May this witness be excused from further attendance?

Mr. Dunne: Yes.

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[fol. 84] WALTER B. MALING, called for the Plaintiff; Sworn.

Mr. Spivock:

Q. Mr. Maling, you are the Clerk of this Court?

A. I am.

Q. And you have been for how many years?

A. About thirty years last past.

Q. As part of your duties, you select half of the names of the trial jurors for this Court?

A. I do.

Q. And the other half is selected by a jury commissioner?

A. That is correct.

Q. And Mr. Mikulich is at the present time, and has been for some time the other commissioner?

A. He has been since the death of Mr. Cummings, I don't know how long, two or three years.

Q. The last few years he has selected the other half?

A. Yes.

Q. Do you recall, Mr. Maling, that I came in to see you on [fol. 85] October 24, 1942, in your office—I came into your office on Saturday morning, October 24, of this year?

A. I remember you were in there recently.

Q. And asked you about the method used in selecting jurors?

A. You consulted me about it, yes.

Q. I asked you how you selected jurors?

A. Yes.

Q. You said to me at that time that you selected mostly business men, is that correct?

Mr. Dunne: That is objected to. The Clerk is here and the question should be put to him directly as to what is done and not what he said at sometime.

The Court: I think so. If you wish to lay the foundation for impeachment that is another matter. The objection is sustained.

Mr. Spivock:

Q. Will you explain the method used in selecting trial jurors for this Court.

A. My method, generally speaking, is to take the City Directory and select the names of people who I think, from their occupation and residence, would be intelligent people to act as jurors in this court.

Q. And in making that selection do you make any effort to select mostly business men?

Mr. Dunne: That is objected to as calling for his conclusion. I think Mr. Maling ought to be asked what he did without characterizing somebody as a business man.

The Court: Find out what he did, first.

Mr. Spivock:

Q. Mr. Maling, you stated that you used the City Directory. Do you use any particular method as to the type of [fol. 86] men that you select?

A. No. If you mean by that do I see what organization or what company they are associated with, if that is what you mean, that does not enter into it, at all.

Q. Is there any effort made—I do not want to put conclusions in your mouth, but is there any method that you use relative to selecting jurors on the basis of their occupation?

A. Yes, I avoid those whom I understand to be disqualified, physicians, and pharmacists, and telegraphers who operate trains, and those various ones that are mentioned as being, as I understand it, disqualified from serving. I don't know that that is the right word; it may be it is merely ground for excuse. I do not know which it is, but I avoid those people; I observed that the judges always excused them on the ground that they should not be compelled to serve, and that includes physicians and school teachers, ministers of the gospel, and such, state and federal officials, and all that class of people. Whenever I see that occupation against their names under those heads I do not put them in, because I feel sure the Judge would not accept that person as a juror.

Q. In going over these lists to pick out the trial jurors, are you interested at all in what their occupation is?

A. No, I do not think so, I do not recall that I ever had any occasion to select because of the occupation.

Q. Well, hasn't there been any effort, or haven't you tried to select business men particularly?

A. Well, people that are working, not necessarily, but [fol. 87] very often that is a guide to me as to the possible age of the person. If he is working as a clerk for Hale Bros., or the Emporium, I feel that he probably is the right age where he should serve, and that is the only way that I can recall now that the occupation would have anything to do with it.

The Court: We are not getting to the main point. You might ask him if he makes any preference between occupations of any kind.

Mr. Spivock:

Q. Is there any preference shown by you in regard to different professions in the making of these selections, or different occupations?

A. I think probably if I say this it will be an answer to your question; if I see in the directory the name of John Jones and it says he is a longshoreman, I do not put his name in, because I have found by experience that that man will not serve as a juror, and I will not get people who will qualify. The minute that a juror is called into court on a venire and says he is working for $10 a day and cannot afford to work for four, the Judge has never made one of

those men serve, and so in order to avoid putting names of people in who I know won't become jurors in the court, won't qualify as jurors in this court, I do leave them out.

Q. The City Directory gives the occupation of each person, does it not?

A. It usually does.

Q. In looking through the City Directory, if you saw the name of a man that was a carpenter, would you select that man?

A. I would not leave him out, no, not necessarily because [fol. 88] he might not be a carpenter who was dependent upon day labor; he might be employed by the month by some outfit that I would not know anything about, and it would not make any difference to him financially, and my idea is where it is going to affect them financially, a day laborer, it is unfair to require such men to serve, and in order to avoid having the names of those men in the box I would leave them out. The name carpenter would not necessarily indicate that he was a man dependent on his day labor.

Q. In other words, if you thought the man was dependent upon day labor you would leave him out?

A. If I felt sure of it, or felt quite sure of it, I would avoid it for that reason, solely for that reason.

Q. If you saw a man listed as a laborer would you select him as a trial juror?

A. I imagine, I would think I would not put him in; I would assume that he was a day laborer, paid according to his work, and he would be deprived of his income if he had to serve here.

Q. If a man was listed as a janitor, would you select him as a trial juror?

A. Oh, yes, we have had janitors here a number of times.

Q. You have had?

A. Oh, yes, I always have. I think of a janitor as a man who is being paid by the month and he would not come within my opinion of a man who would suffer any from being called in.

Q. Do I understand that your effort has been to eliminate day laborers or people that are paid by the day rather than [fol. 89] by the month?

A. They will give that as a reason for not serving, and if they do my experience has been that every one of the judges has always excused those men who said they could not afford

to come here and give up their $10, or $12, or $15 a day for the $4 a day that the Government pays them.

Q. If a man was listed as a mechanic, would you select him as a trial juror?

A. Oh, yes, I would not leave him out on that ground.

Q. You said you would not leave out a janitor, you would not leave out a mechanic, and a carpenter you would not leave out if you thought he was the owner of the business, or worked for a monthly salary, or something of that kind.

A. Where I thought the designation indicated that they were day laborers, I mean they were people who were compensated solely when they were working by the day, I leave them out.

Q. Now, as a matter of fact, in going over the City Directory to select the names of the jurors who have been impaneled the other day for the trial of his Thiel v. Southern Pacific Company case, have you selected anyone on this list who is a mechanic?

A. I don't know what list that is, but, of course, my attention was called to the fact that when the venire was issued, when the venire came in and was returned, it happened that there were a good many on that venire who gave the excuse that they could not afford to serve as jurors on account of losing their pay, that a good many of them were laborers in shipyards and other places, where the Govern-[fol. 90] ment would be losing workmen that they needed for war work, and we had quite a few of those, so I was told, I was not in the courtroom.

Q. Are you speaking of the present list?

A. I am speaking of the venire from which these men that are now serving in this term were selected. You see, we issue a venire for say two hundred, and of that number maybe 150 will come in the first day to be examined as to their qualifications, and at that time they are given an opportunity to give excuses, or reasons for being excused from service, and I was told by my deputy who was in the court-room that there were a number of them who appeared at this time that said that they should not be required to serve for that reason.

Q. Mr. Maling, let me ask you this: You said that you did select some janitors, and some mechanics, and some carpenters. Will you state about what proportion?

A. I have no idea. It would be a guess, and it would not be worth anything.

Q. Would it be a fair statement for me to say this, that of the persons that you select the number of men who might be mechanics, janitors, or of the labor class, is a very small percentage. Would that be a fair statement?

A. Well, I don't know—it would be a small percentage, yes, it would not be the major percentage.

Q. In other words, the major percentage would be what type of occupation?

A. The major, I should say, would be men in business, or their wives; who are not too old to have been retired, and old enough to have responsible positions.

[fol. 91] Q. In other words, it is very clear, then, that the vast majority would be business people and their wives?

A. I do not say vast, I think the majority.

Q. And the number of wage earners or labor people who are paid by the day would be a small percentage, compared to the others?

A. Yes, I try not to put them in.

Q. In other words, you purposely leave them out for the reasons that you have stated?

A. For the reason I have stated.

Q. Now, in selecting the women on the jury, that is, between the women and the men do you try to get an equal number of each?

A. No, I do not try to do anything of the sort; I do not pay any attention to the proportion, to the percentage.

Q. Are there any rules prescribed by the judges, that they have given you, for the method of selecting jurors?

A. No rule of court.

Q. Have you ever selected any Negro on the jury panel?

A. Oh, yes.

Q. How long ago was that?

A. I don't remember, but I know we have had them.

Q. Can you recall the last time that you had one?

A. No, I cannot. You see, in the last ten or twelve years I have not been in the court-room, I have not done court-room work, and it would not attract my attention, and I would not know whether they were white or Negro.

Mr. Dunne: For your information, there is one on this panel.

[fol. 92] The Court: Might I ask in this case is the plaintiff a member of the Negro race?

Mr. Spivock: No, the plaintiff is a member of the white race.

The Court: Do I understand you to say that the plaintiff belongs to the Caucasian race?

Mr. Spivock: Yes, that is correct.

The Court: In other words, he is the type ordinarily referred to as a white man?

Mr. Spivock: A white man or Caucasian.

Q. Have there been any Chinese citizens selected on the jury panel, that you can recall?

A. I think so.

Q. When was the last one?

A. I cannot tell you, I would have to check up with some of my deputies, but I feel quite sure that just a short time ago one of my deputies spoke about the fact that we had a Chinese merchant, I think, on our jury panel.

Q. Are you aware of the fact that there are over 2,000 Chinese citizens here in San Francisco?

A. I do not know anything about it, I do not know the number; of course, I know about Chinatown, I know there is a large number of Chinese, but I imagine most of them are not native born citizens.

Q. There are over 2000 native born citizens.

A. I have no knowledge on that.

Q. Is any effort made to apportion the jurors by districts?

A. No.

The Court: At this point we will take a recess until 2 o'clock.

(Recess taken until 2:00 o'clock p. m.)

[fol. 93] Afternoon Session—2 o'clock, p. m.

The Court: You may resume the stand, Mr. Maling, I think the plaintiff has not finished yet.

Walter B. Maling, Recalled;
Direct examination (resumed).

The Witness: He said he had one more question he wanted to ask me.

Mr. Spivock: Q. Mr. Maling, I believe the last question was with reference to whether you apportioned the jurors among the different districts, and what was your answer?

A. We have never done that.

Q. You never paid any attention to that?

A. No.

Q. Do you make any investigation of the jurors before they are selected, with regard to their qualifications?

A. No.

Q. In other words, you have no idea whether a man is an exconvict, or not when called into court?

A. No, not even as to whether he is a citizen of the United States, we make no investigation, at all we have no facilities for doing so.

Q. In other words, there is no consideration, or have you given any consideration to the Code of Civil Procedure of California, Section 198, regarding competency of jurors? Have you considered that, at all?

A. No.

Q. Have you considered Section 199 of the same Code?

A. I have not considered anything in the Codes of California, except as I said earlier in my examination, as to [fol. 94] certain exemptions or disqualifications. I remember the Federal statute says the same qualifications or disqualifications that are in the State shall apply in the Federal Court, and that is the only thing I have been interested in.

Q. Do you follow Section 200 of the California Civil Code, which states persons who are exempt and lists fourteen of them?

A. I don't know what you refer to.

Q. Section 200 of the California Code of Civil Procedure, which provides that persons shall be exempt from jury duty.

The Court: He covered that this morning, did he not?

A. Yes, I tried to.

Q. Those that were exempt by the State statute.

Mr. Spivock:

Q: You have at no time talked to the jury commissioner of the State Court, as pertains the procedure there?

A. No.

Q. You are not familiar with the rules prescribed by the Superior Judges regarding selection of the jurors?

A. No.

Q. You are not familiar with that, at all?

A. I am not familiar with that, at all.

Q. You are not familiar with the present rule of the Superior Court?

A. No, I don't know anything about their rules.

Q. Now, the testimony that you have given in this case with regard to the method used in the selection of jurors, that applies to the methods which were used in selecting the jury panel that was just sworn in the other day, of about 180 for the trial of this case?

A. Of course, we don't select those names, you know.

[fol. 95]. The Court: The point of the inquiry, as I understand it, is whether or not what you said applies to the jury list from which those names were taken.

A. Oh, yes. There are never less than 300 in the jury box when the names are drawn out.

Mr. Spivock:

Q. In other words, the same procedure that you testified to has been followed many years, up to the present time?

A. All the time since I have been clerk.

The Court:

Q. Specifically, does it apply to the names of the jurors now in the jury box, and from which the present petty jury was summoned and selected?

A. Yes, it does.

Mr. Spivock:

Q. Would it be a fair statement that at least 50 per cent of those jurors are business men, or their wives?

A. Well, I have not looked over that list, but I should think, from my general knowledge of the names that we have had in our box from year to year, it must be about that.

Q. At least that?

A. But I have not examined this particular panel.

Q. I appreciate that, but as a general rule?

A. I would expect that it would be about that.

Q. Then it is a fair statement that by that same method you have followed here the general average would be at least that, there would be at least 50 per cent of this panel who are business men, or the wives of business men?

A. I should think so.

Q. About what percentage of those would you say would be wage earners or laboring people?

[fol. 96] A. About 20 per cent, maybe more than that, wage earners.

Q. Wage earners and laboring people?

A. All of the rest of them—the balance, whatever it would be, if it was 50 per cent for the first lot the rest of them would come under the category of labor, laboring people and wage earners.

Q. Did I understand you correctly—you said that you left out all wage earners and laboring people. Would you explain that?

The Court: Ask him if he said that.

Mr. Spivock:

Q. Did you say that?

A. No, I did not say that, at all. You mean in my testimony heretofore, that I have said that?

Q. Well, would you state what you did say in regard to the excuse of wage earners?

A. I said that day laborers who were dependent upon their daily wage and were getting $10 or $15 a day would always be excused, in my observation, if they came up here and were required to serve as jurors in our court at $4 a day, and so I did not put in the names of those men I thought would be in that category. Now, you are not talking about that class of people, but you are talking about people who are wage earners as distinguished—whose compensation is not a daily wage.

Q. I think we are getting a little confused, here. When I asked you what percentage was business people I had not in mind not only people who were owners of businesses, but business executives and employees of large companies, and those who were getting large salaries, as distinguished from the poorer wage earner. Do I understand you, Mr. [fol. 97] Maling, to say that you had selected primarily mostly business men and business executives, is that true?

A. Well, not business executives—if you mean by that

that I went out of my way to select a large number of the officers of companies, if that is what you mean by an executive, I never have done that; I have just taken people that were employed by reputable business houses whose reputation I knew during the years that I have lived here.

Q. Those are people who have responsible positions, with good salaries, is that correct?

A. I guess they do, I don't know about that. I assume they would not be there if they did not.

Q. In other words, at the time that you selected those people, as you say, that were working for responsible firms, it was known to you, was it not, that those people that you were selecting for the jury were people who had responsible positions, and had pretty substantial salaries?

A. I believe that they did have, yes.

Q. And the jurors selected by you were mostly from that group, is that true?

A. A portion of them, not mainly; I would say half. I estimated a while ago it is 50 per cent.

Q. You think at least 50 per cent?

A. I think so.

Q. Didn't you tell me when I spoke to you in your office on October 24, 1942, that you selected mostly business men?

A. If I put it that way if I said it that way to you, it was not my intention to convey the idea that I was only selecting the heads of business organizations.

Q. No, I did not understand that you were selecting [fol. 98] merely executives. I understood you, just as you say now, that you were selecting people who occupied important positions in business firms, or were in various businesses, regardless of whether the largest, or not.

A. Also their employees, who were salesmen and saleswomen, and that sort of thing, the clerks, and bookkeepers, and all that sort of thing. I took all of those people. I did not intend, when I used the word businessmen, to have you get the idea that I meant all presidents, vice-presidents of a corporation, or anything like that.

Q. I did not understand you to mean merely presidents of a corporation, because we know for a fact that is not the jury system, but in selecting these clerks and sales people, is it not a fact that they are mostly connected with the bigger corporations or working for the bigger corporations?

Mr. Dunne: That is objected to as immaterial.

The Court: The objection is overruled.

A. No; they are working for all sorts of merchandise, big and little, if that is what you mean, the size?

Q. During the recess, Mr. Maling, have you discussed your testimony here with Mr. Dunne?

A. No.

Q. Were you talking with him at noon?

A. I introduced Mr. Mikulich to him as we went out. I don't remember whether I said another word to him.

Q. You were talking together during the noon recess with Mr. Dunne, were you not?

A. No.

Q. You introduced Mr. Mikulich to him and you said nothing?

[fol. 99] A. That is as we went out at twelve o'clock, when Mr. Mikulich and I walked out, and Mr. Dunne walked out behind me, and Mr. Mikulich said, "Are you going down town?" And I said, "No." I called to Mr. Dunne and said, "This is Jury Commissioner Mikulich, Mr. Dunne," and I think he responded by saying he knew him, or something like that. I did not have any conversation with Mr. Dunne about the subject of this matter, here, about jurors; I do not think I had any conversation with him, at all, as a matter of fact.

Mr. Spivock: I think that is all.

Cross-examination.

Mr. Dunne:

Q. Mr. Maling, before we get to the matter of getting the names of the jurors, it has been the practice, wherever the names were gotten from, to have at least 300 names in the jury box.

A. Yes.

Q. Isn't that correct?

A. We would always have more than 300, so that at the time of drawing we would never be short.

Q. Do you draw from that same box both the names for the grand jury and for the petty jury?

A. Oh, yes, they all come out of the same box.

Q. After the names have been drawn for the petty jury, those persons whose names are drawn are then summoned by the Marshal, isn't that the practice?

A. Correct.

Q. And after they are summoned by the Marshal they are then brought before one of the judges, is that correct?

A. That is correct.

Q. On questions of qualifications and excuses, is that not [fol. 100] correct?

A. Yes.

Q. And at that time has it been the uniform practice for the judge who is presiding to state to them as to the qualifications, and ask if there are any who do not have the necessary qualifications?

A. Well, I can only answer that—as you know, for some years I have not been going into the courtrooms, but in the days when I served under Judge Van Fleet, in the courtroom, he had practically that method of examination, and heard the excuses of jurors. I think he usually had the statute before him, and if he did not he had notes of it, and would recite to them what he was going to consider as proper excuses, and there was no use for them to make any that were not under that category. I think the judges now follow that same practice.

Q. At least, so far as you know that has been the practice?

A. Yes.

Q. Since then and since you have no longer been active in the court-room?

A. Yes.

Mr. Dunne: If your Honor please, we should like to call one of Mr. Maling's deputies to indicate that has been the practice, and that it was the practice with this particular panel.

The Court: The Court will give both sides an opportunity to call such witnesses as they may wish to call.

Mr. Dunne:

Q. This practice that you have described, in selecting the list of names that go into the box, is a practice that you have followed for some years, is it not?

[fol. 101] A. Yes, I have always followed it. I have followed it since I have been Clerk here, and I followed it when I was Clerk in Hawaii.

Q. As a matter of fact, in this very court there have been similar motions directed at the jury panel, have there not?

A. Well, we had one about a year ago right in this court-room, when Judge Welsh was sitting here, in which they challenged the entire panel, but I do not recall any other.

Q. As a matter of fact, Judge Welsh overruled that challenge, did he not?

A. Oh, yes.

The Court: Do you remember the point involved?

Mr. Dunne: It was the same general point.

Mr. Spivock: No, I will have to object, it was a different type of challenge. That was a criminal case.

The Court: Was this same question passed upon by Judge Welsh?

Mr. Dunne: It was not entirely the same.

The Court: Did Judge Welsh happen to file a written opinion or decision?

Mr. Dunne: I think not.

Q. The practice that you have followed and the practice that was followed in respect to this particular panel that has now been called and sworn to serve is the same practice you followed in the matter that Judge Welsh passed upon?

A. Oh, yes.

Mr. Spivock: I will object to this line of questioning because the ruling by Judge Welsh was as to a different matter. I have no objection to your Honor examining the [fol. 102] points of law involved if your Honor desires to get information that way, that is perfectly in order, but putting that in evidence as part of this proceeding I think is entirely out of order.

The Court: I believe the objection will be overruled. I am inclined to think that it is only fair to let Mr. Dunne ask such questions since the court overruled Mr. Dunne's objection to your question to Mr. Halfman and Mr. Hildebrand concerning their experience and other things relating to their practice. I think it is entirely fair to let the question stand and it is so ordered.

Mr. Dunne:

Q. Mr. Maling, you were asked some questions this morning about this particular panel, and if I remember correctly you said you were not in court when Judge Roche

examined the venire, the men on this particular venire, is that correct?

A. That is correct.

Q. Who is your court-room clerk who was serving at that time, if you know? Was it Mr. Calbreath?

A. I think it was Mr. Calbreath. Mr. Welsh is the court-room clerk for Judge Roche, but it is my recollection that Mr. Calbreath went in on that case, because it had been intended that Judge St. Sure would examine those jurors, and he was ill that day, and Judge Roche did it for Judge St. Sure. I am quite sure it was Mr. Calbreath.

Q. You were asked a short time ago whether or not you paid any attention in the selection of names to go into the box to districts. Let me ask you this, have you ever intentionally or deliberately excluded a resident of any particular district?

[fol. 103] A. No.

Q. When you say you paid no attention to districts, you mean it made no difference to you, at all, isn't that correct?

A. Oh, yes. I thought he meant I would take a certain percentage from one precinct and a certain percentage from another precinct, and work it out mathematically so that we would get some percentage from all over the division, and when I said no, I meant it in that sense. Of course, I do this, if I see the name of an employee of a company who is a resident of Sacramento, I do not put his name in, because I know that he does not reside near here, and even if he could serve the Judge would never require a man to come down from Sacramento, or from a long distance. I do not go beyond San Jose, ordinarily; on the one hand, and San Rafael on the other.

Q. Is that a practice that you have followed with the approval of the judges of this court?

A. Oh, yes. I was instructed to do that.

Q. So that you can say that there has never been a purposeful exclusion of residents of any city or town or part of a city or town, isn't that correct?

A. So far as I am concerned, that is absolutely correct.

Q. Now, has there been any purposeful exclusion of Negroes or Chinese?

A. No.

Q. Has there been any purposeful exclusion of men who worked with their hands, just because they worked with their hands?

A. Never.

Q. Or any exclusion of men of small salary, whether by [fol. 104] the day or otherwise, simply because their salaries are small?

A. Never.

Q. Has there ever been any exclusion of any person simply because he was poor?

A. Oh, no.

Q. Has there ever been any exclusion of any individual who worked at any particular trade simply because he worked at that trade?

A. No.

The Court: You have spoken of longshoremen.

A. I did that simply to illustrate a man who I knew was getting nothing but a daily wage, that was not employed regularly, that was only paid for the time that he put in. That is what I meant. I used that as an illustration to illustrate those men whose earnings depend entirely upon the number of hours that they work; every hour that they lose coming up here to serve as a juror they lose that much. There is nothing to compensate them but $4 a day as against $10 a day at their work.

Mr. Dunne:

Q. Have you ever excluded a longshoreman just because he was a longshoremen?

A. No.

Q. I assume that a man engaged in loading and unloading freight from vessels and railroad cars and trucks, when on a monthly wage instead of an hourly or daily wage, you would not exclude his name from the box?

A. No. I think we have got on this jury panel, I do not think it is a longshoreman, but I think we have a laboring man on this panel right now who is not a wage man, but is an officer of one of the unions. I may be mistaken about that, but I am quite sure that we have.

[fol. 105] Q. And this distinction that you have made is not on the basis of earnings, or wealth, or character of work, but is a distinction based on whether or not a man will be excused because he will lose money.

A. That is the only thing that governs me at all in excluding any of them.

The Court: In that connection, this morning you spoke of war work that some persons are now doing. Has that been accentuated in latter months, or has that been constant?

A. As a jury commissioner, I do not think I would know whether they were on that, or not, but I *think* I *mentioned* that in connection with the fact that the judges let them off if they are engaged 75 or 95 per cent in war work. We had quite a few jurors in the last term, and one of them came in to see me about how he could be excused, and wanted to know how he could do it. I found out what his reason was, that he was working almost entirely; I think he said, 90 per cent on Government contracts, and I told him he could tell the judge that and it would probably be a good reason for letting him off.

Mr. Dunne:

Q. If I understand you, Mr. Maling, if a man is known not to be qualified under the rules of qualifications under the statute, you will not put his name in the box?

A. I never put it in if I know he is disqualified.

Q. You endeavor not to get people so old that by reason of their physical condition they cannot serve?

A. That is correct.

Q. One other thing, you aim to keep names out of the box of persons who, either by reason of exemption of the State statute, or by reason of the practice, here, that the [fol. 106] judge would excuse if and when they came to be sworn?

A. Those are the only ones that I endeavored to keep out of the box.

Mr. Dunne: That is all.

Re-direct examination.

Mr. Spivock:

Q. Have you made any endeavor at all in your jury selection to get a cross section of the people of San Francisco with regard to their wealth or financial means?

A. No, I have not, I don't know how I would do it.

Q. You have made no attempt along that line?

A. No.

Q. When you said you left longshoremen off the list, you purposely left longshoremen off the list for the reason you gave?

A. I only used that as an illustration. I might have taken some other line. I don't know what it would be, but Greyhound drivers, or something like that—I only used the work "Longshoremen" because I thought it illustrated what I had in mind; of a man who was dependent upon his daily wage. That is the only reason I used the word "longshoremen," just as an illustration.

Q. But taking men such as longshoremen, you use that to distinguish that class of men that were working for wages?

A. Yes.

Q. All of that group you have purposely left off?

A. I have endeavored to do it, I have aimed to do it.

Q. So far as your intention is concerned, you endeavor, as far as you are able to do it and leave that group off of the jury panel?

A. That is correct.

Q. Do you make any attempt to put the wives of that [fol. 107] class of men of longshoremen on the jury list?

A. We do, because as to the wives I do not pay any attention to what their husbands occupation is, if that is what you mean.

Q. Isn't it a fact that to your knowledge the women that are on this jury panel, that the great proportion of their husbands are business men?

A. I don't know. I have never checked it up.

Q. In other words, you would not be able to say that of your own knowledge, that the biggest percentage of those women are wives of business men?

A. No. I noticed some of them were sales women in stores and that sort of thing.

Q. Is it not a fact that the biggest percentage of the women on this jury panel are either the wives of wealthy men or business men?

A. I do not know.

Mr. Spivock: That is all.

Re-cross-examination.

Mr. Dunne:

Q. As I understand you, you paid no attention whatsoever to whether the prospective jurors were wealthy or poor, in fact you knew nothing absolutely about their financial condition, is that correct?

A. I don't know a thing about their financial condition.

Q. And have never attempted to make any selection based on their financial standing?

A. Never.

Q. And the same goes with respect to the women, you have never attempted to make any selection of women based on whether their husbands were engaged in one line of endeavor or another line of endeavor?

A. That is correct.

Q. Or whether they were rich or poor?

A. That is correct.

[fol. 708] Q. You just pick them as they come?

A. Yes.

Mr. Dunne: That is all.

Further re-direct examination.

Mr. Spivock:

Q. It is common knowledge to you that business men and wives of business men generally represent a higher class of wealth than the working people?

A. I do not think I quite get you.

Q. As a matter of fact, don't you know that business people, as a general rule, are much wealthier as a class than laboring people or working people, don't you know that?

The Court: I think the question should be confined to what he knew and had in mind and considered when he was making up his part of the jury list.

Mr. Spivock:

Q. When you selected mostly business men, as you have stated, Mr. Maling, didn't you have in mind that the business people generally represent more the wealthy class than the laboring people?

A. No, I did not pay any attention to the financial standing of anyone.

Mr. Spivock: That is all.
Mr. Dunne: That is all.
The Court: You may step down.

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WILLIAM C. MIKULICH, called for plaintiff; sworn.

Mr. Spivock:

Q. Mr. Mikulich, what is your business or occupation?
A. I am an insurance broker.
Q. In the Mills Building?
A. Yes.

[fol. 109] Q. You are also a jury commissioner of this court?

A. Yes.

Q. How long have you served as such?

A. I think it is somewhere around three or four years now—three years, probably.

Q. You have heard the questions which I have propounded to Mr. Maling?

A. Yes.

Q. And would your answers generally be pretty much the same?

A. As a whole, yes.

Q. Then it is a fact that in selecting jurors for this court you select mostly business men, is that correct?

A. Well, I would say about 50 per cent.

Q. Isn't it a fact that the average runs a little higher than 50 per cent?

A. Well, I don't think so. I have tried to keep away from the business end.

Q. When I say business men, I am not referring merely to the executives, such as presidents, or owners of business; you know there are a great many employees in a big corporation that hold responsible jobs, and we call them business men in that sense, although they are working for a big concern.

A. But a salesman for a brewery would not be considered a business man.

Q. No, I do not think he would be called a businessman, but would you say at least 50 per cent of those men selected are business men?

A. Yes, connected with some business concern, probably.

Q. They are either business men or connected with some big business concern?

A. Yes.

Q. In your selection, do you omit from the jury list wage [fol. 110] earners and laborers?

A. No.

Q. Did I understand you when I was talking to you about it that you did not put in the laboring people?

A. Labor people, yes, as Mr. Maling has explained, a carpenter comes in here who is getting $15 a day, and he is working on a job, and he is complaining about taking him off the job.

Q. You look at his name, and as soon as you see he is a carpenter you omit him, is that correct?

A. Yes, because in the past those men came into court and offered that as an excuse, and the judge usually let them go.

Q. And, of course, the very reason you omit them is because you feel the judge might let him go?

A. Yes, and it is an injustice to the man, I believe.

Q. Will you explain the type of occupation that you exclude purposely, what type of occupations?

A. Well, all the iron craft, bricklayers, carpenters, and machinists.

Q. All of those groups you have excluded from the jury list?

A. Yes, and in this O'Neill case they were objecting we had no Union Labor people on there, and there was a lady on the jury whose husband was a janitor belonging to the janitor's union.

Mr. Spivock: I move to strike that as not responsive.

The Court: The motion is denied.

Mr. Spivock:

Q. Then the types of people that you definitely omit from the jury list are those that you say are of the highest class in the labor world?

A. Yes.

Q. How about a person who is listed as laborer, would you select him as a juror?

A. Yes, if he wanted to serve.

[fol. 111] Q. Have you ever as a matter of fact selected anyone who was listed as a laborer?

A. It is hard to tell you that.

Q. Have you any recollection of one instance where you selected a laborer?

A. No, I have not, but I do know this, when this question came up about a year ago that no labor people were appearing on the list I wrote out to one of the officials and asked them if they had any union labor people available for jury duty, and I never received a reply from them.

Q. Was it necessary for you to ask the consent of a union labor organization whether they would supply you with jurors, or was it your duty?

A. I was trying to be fair and get a percentage of union labor in there, the objection being that we had not put union labor people on the jury.

Q. However, it was known to you, was it not, that you did not have to ask the consent of the union to select them; in other words, it was not for you to decide whether it was fair, and your duty was merely to select a cross section of the people in San Francisco who might be impartial and fair jurors?

A. Yes.

Q. In making your selection you say certain classes of labor were purposely excluded by you?

A. Yes, what I said before, and Mr. Maling has said, if we selected those people and they came into court with valid excuses, the judges let them go, and all you would do is take their time.

Q. With regard to women, have you made any effort for them to have equal representation on the panel?

A. I happened to drop into Judge Roche's court room the [fol. 112] other day, when he was selecting this panel, and it looked about 60 per cent men and 40 per cent women.

Q. Is there any reason on your part why you put on more men than women?

A. It is rather a hardship,—this is purely my opinion, it is rather a hardship on women who have their homes, with the burden of housekeeping, motherhood, and the rest, and they do not want to serve as they did at one time.

Q. So, as a result of that, you have used your own best judgment, and you have purposely put on more men than women, is that correct?

A. Yes.

Q. Have you made any effort to apportion the jurors that you have selected by districts?

A. No.

Q. Have you any facilities to do that?

A. No, we have no facilities, we have a big district that runs from here to San Luis Obispo and up past Marin County.

Q. Do you receive any compensation for your work?

A. Yes, I receive, I think it is, about $100 a year.

Q. In other words, the appointment is really sort of honorary?

A. Honorary.

Q. There are no facilities provided for you to make an investigation of the qualifications of a juror before he is brought into court?

A. No, I have not the power of subpoena, or anything else, I cannot bring them in as the Jury Commissioner of San Francisco can do, and examine them, and take that off the judges' hands.

Q. Have the Federal Judges given you any directions or rules as to how you should go about selecting jurors?

A. No.

[fol. 113] Q. They merely tell you to go and get a jury and leave it entirely to you?

A. Yes.

Q. Do you follow any rules of the State Court or follow the Code sections here?

A. No.

Q. Are you familiar with them?

A. No, I am not. Mr. Maling notifies me about every ninety days that we are going to select another jury panel, and I give him half of it in two or three days.

Q. Do you make any effort to put Negroes or Chinese on the list?

A. No.

Q. Mr. Mikulich, have you had any business with the Southern Pacific Corporation?

A. No.

Mr. Spivock: That is all.

Cross-examination.

Mr. Dunne:

Q. Mr. Mikulich, as I understand it, far from excluding or attempting to purposely exclude labor people or working people, you have actually made an effort to get them on the panel, is that correct?

A. Yes.

Q. That has been a conscientious effort on your part?

A. Yes.

Q. Have you ever purposely excluded any geographical area in the City of San Francisco, or its vicinity?

A. No.

Q. Or purposely excluded any other area within this District, within traveling distance of court?

A. No.

Q. I assume that you do not put in the names of people who live over 100 miles at San Luis Obispo?

A. No. I never have gone down as far as San Jose, although the court allows expenses if they live that far away. [fol. 114] Q. You endeavor to get people who are within traveling distance of the Court?

A. Yes.

Q. Have you ever excluded or attempted to exclude any person or class of persons because of the nature of the work they do?

A. No.

Q. Or because of the amount of pay they receive?

A. No.

Q. Or because of their wealth?

A. No.

Q. Is it correct that your only exclusion in that respect is as Mr. Maling expressed it, that you endeavor not to put into the box the names of those persons, persons of the type that you know from experience the Court will excuse when the time comes for examination of the jurors and swearing in of the panel?

A. That is what we try to do.

Q. But otherwise you make no discrimination whatsoever?

A. No.

Mr. Dunne: I have no further questions.

Redirect examination.

Mr. Spivock:

Q. Mr. Mikulich, the method which you have testified to as using in the selection of the jury was the same method used which resulted in this list of about 100 sworn in the other day before Judge Roche?

A. Yes.

Q. One other question, do you make any attempt to get a cross section of people of San Francisco with regard to wealth in selecting the names of jurors?

A. No.

Q. Might I ask you if it is not a fact that you do select, primarily, those who are of the wealthy group, business men and such?

A. No, that is not true. As I say in our selection, we will come across, we will say, John Brown, Clerk of the Standard [fol. 115] Oil Company, he sounds like an intelligent man, and we put him in the box and the Judge then interrogates him.

Q. But so far as a cross section of San Francisco people in regard to wealth is concerned, you have no knowledge one way or the other on that?

A. No, although the big corporations and people hiring a lot of people are usually down in that section which you call the business district, but most of them live in Berkeley, Fruitvale, or some place like that.

Q. In other words, the main group of names that you select are taken from the busjness district, is that true?

A. About 50 per cent.

Q. At least 50 per cent?

A. Yes.

Q. And, of course, it is common knowledge that the business people are the wealthier class rather than the laboring class?

A. I guess that used to apply.

Mr. Spivock: That is all.

Mr. Dunne: I have no further questions.

(Endorsed:) Filed Aug. 21, 1943.

[fol. 116] The Court: You may be excused. Call your next witness.

(Here follows the testimony of Walter B. Maling and William C. Mikulich.)

The Court: Call your next witness.

Mr. Spivock: I have no further witnesses. I believe it would be merely cumulative to call more attorneys. In other words, we have the two jury commissioners and two attorneys.

The Court: He has finished his evidence and you may proceed.

Mr. Dunne: I should like to call Mr. Calbreath.

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CARL W. CALBREATH, called for the defendant; sworn.

Mr. Dunne:

Q. Mr. Calbreath, what is your business?

A. Deputy Clerk in this court.

Q. How long have you been a Deputy Clerk?

A. Since 1912.

Q. Mr. Calbreath, did you act as the court-room clerk for Judge Roche at the time that the present panel of trial jurors was summoned to appear before Judge Roche?

A. I did.

Q. Did Judge Roche on that occasion when the panel was present, those who had responded—did Judge Roche at that time read to them the California statute as to the qualifications of jurors?

A. Yes, he did.

Mr. Spivock: California statute, did you say?

[fol. 117] Mr. Dunne: Yes, as to the qualifications of jurors.

Q. Did he at that time inquire whether or not there were any of those who had been summoned who did not have those qualifications?

A. He did.

Q. Do you recall now whether any responded that they did not have those qualifications?

A. They did.

Q. To those who responded they did not have the qualifications, what did Judge Roche say?

A. He excused them.

Q. So that those people are not on this panel?

A. Correct.

Q. Has that practice that Judge Roche followed, so far as you know been the constant practice of this court?

A. It has been since I have been Judge St. Sure's courtroom clerk.

Q. Now, Mr. Calbreath, in respect of all the names of the persons that were drawn from the box, are you able to say from the proceedings had before Judge Roche whether any of those were persons that could be classed as working people?

A. There were quite a number.

Q. Could you give us an idea of the number that appear on this jury list?

A. I would say as we heard stated in court, there were about 25 percent of this present panel. You understand, we do not inquire of everyone their vocation, I mean on the panel, out of that 100, I should say that he examined maybe 25 or 50.

Q. When you say Judge Roche examined them, you mean he examined them when under oath?

A. When they came up and presented excuses. There were 161 summoned. We now have on the panel of jurors 105. Judge Roche examined the difference between those [fol. 118] figures and excused them.

Q. That would be 56?

A. About 56.

Q. That he examined and excused?

A. Yes. That might have been in court, it might have been by a letter sent to him.

Q. As a result of this examination, about 25 percent could be classed as laboring people?

A. I would say that.

Q. Men who work with their hands?

A. Yes.

Q. Men who work for daily wage?

A. Yes.

Q. What character of people were they?

A. May I refer to some notes here that I have? Here is a lady, a saleslady in O'Connor-Moffitt. She has served

on the jury before, she will serve beginning the first of the year.

Q. Will you tell us why she will serve the beginning of the year?

A. She told the Judge this was the busy time of the store of O'Connor-Moffitt, they were short of clerks, and she was willing to serve after the first of the year, or the Christmas season was over.

Q. So the Judge gave her a temporary excuse?

A. Until January 1. George W. Brown was a leaderman in the shipyard in Sausalito. I understand a leaderman is a foreman. He was excused permanently. Daniel W. Desmond is now on the jury. He gave his profession as a labor negotiator. He asked to be excused. The judge denied it. A man named Carl E. Haglund works for the City Water Department of San Francisco. Charles S. Hobbs, with the White House, asked to be excused because of the rush of business and shortage of help at the White House. Reed Jones was a checker clerk and watchman at the Encinal Terminals in Oakland. He worked nights. [fol. 119] Walter W. Krueger is a time checker in a project at Hunters Point. Clota C. Sayre is an office employee, a stenographer with one of the drayage firms. I did not get the name of the firm. She is serving.

The Court: Serving on the jury panel?

A. Serving on the Jury Panel. Charles A. Wickliffe is with the Bethlehem Steel Company in San Francisco in piecework payment and accounting department. He was excused. Elmer C. Durnin is with the Walworth California Company in charge of orders, traffic and inventory control. He was excused. Charles W. Coey is an accountant with the Albert S. Samuels Company. He was excused. That is a jewelry firm. Earl F. Hughes is manager of one of Lundstrum's hat stores in San Francisco. He was excused. A. Clive Wilshire is a journeyman electrician at the Marin Shipyards in Sausalito. He was excused. Frank M. Stoll was a switchman for the telephone company in San Francisco, and he worked at night, and he was excused.

Mr. Dunne:

Q. Now, in the past, from your experience, acting as court-room clerk for the judges of this Court, when names

were drawn from the box were being examined for qualifications or presenting excuses and were being sworn on the trial panel, has it been your experience that there were upon all of these panels people who could be classed as working people, that work with their hands?

A. In 1940, the July term, when they adopted the master panel of trial jurors and they were impaneled before Judge St. Sure, each time from then on I can say that there were a large number, sometimes 25 percent, sometimes 35 percent. A great many of those, however, were excused. I have a list of a few of them that did serve on the jury.

[fol. 120] Q. Those were names that came out of the box as the examination proceeded, came out of the wheel?

A. Came out of the wheel.

Mr. Dunne: That is all.

Cross-examination.

Mr. Spivock:

Q. Mr. Calbreath, you said that Judge Roche read certain California statutes to the jury the other day. What were those sections?

A. Sections 198, 199 and 200 of the Code of Civil Procedure. And I think he read section 201.

Q. 198, 199, and 200?

A. And I think 201, which has to do with no excuse shall be——

Q. (Interrupting:) 201 has to do with excuses of jurors?

A. Yes.

The Court: May the witness be permitted to look at the statute?

Mr. Spivock: Yes.

A. Section 198 is, "Persons competent to act as jurors." He then asked for anybody that came under this to step forward. Then section 199, "Persons not competent to act as jurors." In that category I think there was one man excused because he was not a citizen. Then 200 is "Exemption from jury service," and 201 is, "Considerations governing excuses of jurors." I think that is as far as he read.

Q. You said that there were approximately 161 jurors that were on the panel present before Judge Roche?

A. There were 161 served by the Marshal.

Q. And out of that group 105 now remain on the panel?

A. I think it is 105 or 106 that remain on the panel for service as trial jurors.

Q. And Judge Roche you said excused about 25?

A. The difference between 105 or 6 and 161 was what he excused.

[fol. 121] Q. Are you positive they examined in open court all of the jurors that were excused?

A. Well, I am not positive of that. I will say that A. Clive Wilshire wrote a letter to the Judge and he was not present in court, and there were some isolated instances like that where they had written a letter to the Judge and he passed on their excuse and handed me the letter and said to excuse them from the panel.

Q. Did I understand you to say Judge Roche examined about 25?

A. He examined more than——

Q. More than that?

A. Yes. They filled the jury box twice, that is, 24 in the morning, and in the afternoon he filled the jury box and examined about 20 in the box.

Q. About 44?

A. Yes.

Q. Out of 44 you said about 25 percent of those represented working people or laboring people?

A. I think that is about right.

Q. In other words, the 25 percent is based on those who were excused only, is that correct?

A. That is right.

Q. However, in this group of 105 remaining who did not ask to be excused, did you make any check on their occupation?

A. No, they were not checked for their occupation.

Q. Isn't it a fact that on that list of 105—have you glanced over them?

A. Yes.

Q. Their residences, where they live?

A. Yes.

Q. Are you familiar with some of these people? Do you know what their occupations are from reputation?

A. Yes.

Q. Isn't it a fact that most of the jurors on this present panel right now are of the wealthy class?

[fol. 122] A. I would not say that. Rebecca Bernstein is on there, she is a saleslady. Mr. Desmond is there; he is a labor negotiator. Clota Sayre is a stenographer, office employee. There is a man named Wisely who works as a salesman for Dun & Bradstreet. I don't know any of the others just now off-hand.

Q. You have testified very well as to those that are of the so-called working class. How about Eva S. Golden?

A. I don't know.

Q. She lives at 1000 Mason street, one of the wealthiest apartment houses in town.

A. I couldn't tell you anything about that.

Q. Are there any others that you know of that are business people or wealthy people?

A. There is a man named Davis; he was in the office this morning talking with me; he works for some firm and he has been called back to Chicago.

Q. Do you happen to know Fred G. Ainslie, 1517 Pine Street?

A. No.

Q. Do you happen to know Berwick B. Futernick, 444 Bryant street?

A. No, I don't know him.

Q. Do you know Garrett M. Goldberg?

A. Yes, he owns a paint store on Mission street.

Q. Quite a wealthy man, isn't he?

A. I couldn't say.

Q. In other words, it is very clear to you, is it not, that at least a majority of them are of the wealthy group?

A. I would not say that.

Q. They are at least of the business class?

A. They are.

Q. There is no doubt there are more than 50 percent of the business class?

A. I don't know enough about them to say.

[fol. 123] Q. You have given quite a bit of testimony on those that are employees.

A. I only know a few of them; later on when they are examined in the jury box and their occupations are given then I will know more about them.

Q. You have been connected with the Federal court for quite a while.

A. Yes.

Q. You have conversed quite a good deal with attorneys?

A. Yes.

Q. Isn't it a fact, without any question of doubt, that the general run of jurors on the jury panels, the majority of them are so-called wealthier business men?

A. I would say about 50 percent.

Q. At least 50 percent?

A. It varies; on some of the jury panels it has been less than 50 percent.

Q. But according to the method you use of acquiring them they average at least 50 percent of the business executives or people of the wealthy class?

A. I would say they may be business men, I would not know whether they were wealthy.

Q. You would say at least they are in the business class?

A. Yes, some kind of business.

Q. In other words, you appreciate some might not be wealthy but they are at least in the business class?

A. That is true.

Mr. Spivock: That is all.

The Court: Step down. Call your next witness.

Mr. Dunne: If your Honor please, I should like to be sworn.

Mr. Spivock: Do you wish the right to argue the matter afterwards?

Mr. Dunne: Yes, I do.

[fol. 124] The Court: Do you object to his having that right reversed?

Mr. Spivock: No, I won't object to that, your Honor.

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Arthur B. Dunne, called for the defendant; sworn.

The Witness: My address is 2090 Vallejo street. I am an attorney-at-law, licensed to practice in all of the courts of the State of California, the United States District Court, the United States Circuit Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States. I was admitted to practice in the State of California in August, 1923, and since that time I have practiced my profession at my office in San Francisco.

In view of the testimony, if your Honor please, that was given this morning by Mr. Hallinan as to the Kurtz case,

I cannot independently remember these matters, but by reference to my own notes at the time of the impanelment of the jury, I would like to state the composition of the jury in the case of Kurtz v. Southern Pacific Company. I do not have all the full names; in many instances I have only the last name. Mr. Lemons was in the investment security business; my recollection is he was not the proprietor of that business. Mr. Cassidy was a retired manufacturer's agent, and when in business had his own small establishment representing Eastern manufacturers of underwear and hosiery. Mr. Rushforth was an employee of Gantner & Mattern, a manufacturer of textiles here in San Francisco, and which at one time had a retail store; whether they still [fol. 125] have that retail store or not I could not say, your Honor. Mr. Apple was a retired bookkeeper of the United States Post Office. Mr. Williams was an employee of Armour & Company. I have not a clear recollection of that man, to say just what his capacity was. He was not one of the principal managers, I can say that. Mr. Glover was connected with the Equitable Life Insurance.

Mr. Spivock:

Q. You say with the Equitable Life Insurance Company, In what capacity?

A. I hesitate to say. I know he was not one of the heads of the office here. My recollection won't permit me to go beyond that, to say exactly what his connection was. I want to say the same thing of the next man, Mr. Adams, he was connected with the Connecticut Mutual Life Insurance Company. The next man was a Mr. Cunningham, and I have no note as to what his business or work connections were. The next man was a Mr. Malthuse, who was a paint contractor, and my notes would indicate he had his own business. Mr. Wood was secretary of the Mechanics Institute. The Mechanics Institute is an organization in San Francisco that was financed to maintain a library downtown. Mr. McLean was a retired caulker, and Mr. Bolander was a millwright. On the jury in the other case, before I pass to the other case, my notes also indicate.

Mr. Spivock:

Q. You are referring now to what case?

A. The Kurtz case. My recollection is, verified by my notes, that the plaintiff in that case exercised only two peremptory challenges.

[fol. 126] The Court: When was the Kurtz case tried, do you recall, about?

A. My recollection is the Kurtz case was tried about five years ago before Judge St. Sure.

Q. That was against the Southern Pacific Company?

A. The Southern Pacific Company. The second case, or the case referred to by Mr. Hildebrand this morning, Merritt v. Southern Pacific Company, I did not impanel that jury, and the notes that I have are the notes taken by an associate, a young man in my office, who did impanel that jury. He has no notes as to the first juror, a Mr. Bugeia. The next juror, Mr. Sheehan, was a retired member of the San Francisco Fire Department. The next, Mr. Smith, was an architect; the next man, Williams, the note is he was an ex-employee of the Southern Pacific Company who at the time was, and my recollection is, had been employed for some years by the California Redwood Association, that is an association concerning the preservation of redwood trees of California. The next juror was Sherman; I have no notation as to him. The next is Bailey, an engineer. The next was Mr. Tyler, a timekeeper. The next one was Mr. Bruml; it looks like, the notation is a salesman at Capwell's, that is a store in Oakland. The next one was Mr. Manseau, it looks like, I am not sure of this writing, a retired Army man. The next one was Mr. Bucklew, who was then unemployed. The next was Mr. Kern; the only notation is general insurance. The next is Dow, an importer of vegetable oil.

Comment was also made this morning on the merits of the Kurtz case, and if your Honor deems that pertinent I should like to state an outline of that case to your Honor. Some comment was made.

[fol. 127] The Court: By the other counsel, do you mean?

A. Yes.

Q. You may do so.

A. Kurtz, a passenger on the Southern Pacific train from Santa Barbara to come to San Francisco claimed to have purchased a ticket. He was the only witness on his own

behalf, except medical witnesses. He testified that he purchased a ticket in the afternoon of the day he left Santa Barbara at the Southern Pacific ticket office at the depot at Santa Barbara; he boarded the train known as the Sunset, went into a chair car; he had no Pullman ticket. He rode in the chair car until about 50 miles north of Santa Barbara, the train had been moving a little over an hour, when he left to go back into the train to find the Pullman conductor in order to obtain a Pullman ticket; just as he stepped to the door of the car in which he had been riding and onto the vestibule, the train lurched; he claimed that he was thrown to what was then his left, which would be the right side of the train in the direction in which it was moving; that the door there in the vestibule was open, and he fell out and was injured. His testimony was very positive that he fell from the right-hand side of the train. His testimony also was that as a result of the fall he was so injured that if not unconscious, he was almost unconscious and incapable of even walking or crawling. Our evidence developed that he was discovered on the right-of-way some hours later by the crew of a train which was moving south from San Francisco towards Santa Barbara; that he was not found to the right of the track in the direction in which the Sunset had been going, but was on the other side of the track, and that he had not crawled there, and from that we [fol. 128] argued and urged that his testimony that he had fallen from the right-hand side was inherently improbable and was false. The defendant also produced the testimony of the trainmen that no doors or drops on the train had been left open, and we also produced testimony from witnesses and from records that no such ticket as he claimed to have purchased was sold by the Santa Barbara ticket office that day. He testified that he had purchased at the Santa Barbara depot a one-way ticket for transportation from Santa Barbara to San Francisco. Our agent testified that the record showed that no such ticket had been sold at that station that day or the day before, or the day after. That is my recollection of the testimony, it was a series of three days; the day of the accident may have been the third of that series of three days, or it might have been the first, I do not want to be positive that a day was blanketed on each side; but in addition he claimed he boarded the train with an overcoat and with a bag and hat, and my recollection is that at the time he was found he did not have any bag

with him, and he did not have any hat, and my recollection is indistinct as to whether he testified he had his overcoat at the time he was found. Our evidence showed that there was a uniform practice of searching this train when it arrived at terminals to find anything in the train that had been left by the passengers, and keep a record of it, and that such a search had been made and our records disclosed that no articles of the description that he claimed to have boarded the train with were found on the train, or were turned in by anybody. In addition to that, he was carefully examined as to the movements of the train from the time it [fol. 129] arrived at the Santa Barbara station until it left, and he testified that the train came in, stopped, that he boarded the train, and then there were no further train movements until the train, itself, left Santa Barbara and started on its northward journey. We showed by our evidence that it was the practice, not at the time of the accident, but at a later time that the practice had been changed, but at the time of the accident the train was made up of a number of cars, including the diner, and that at the time of the accident it was the practice to switch that diner out of the train at Santa Barbara and not carry it north of Santa Barbara, while at a later time the practice was to keep the diner on the train. We also produced evidence that after this man was out of the hospital he was again seen at Santa Barbara, that he had been seen in the station, and my recollection is that the station agent testified that the man made inquiry at the station as to the routine of purchasing tickets and reserving seats on the train. And we also were able to produce testimony that at a later time after the accident and when this man was out of the hospital, he was found in company with another man at King City, California, which is between Santa Barbara and San Francisco riding northward on a Southern Pacific freight train, riding without transportation; that case was defended and we put it to the jury on the ground that the man was not telling the truth, that he had not purchased any ticket, that he had not gotten on any train, that he had made a subsequent investigation and reconstructed his story, and that he had made the mistake in the practice of the operation of the train and the cutting out of the diner, that he [fol. 130] had not been a passenger on the train, at all, but he was a trespasser on the train, and was on the bag-

gage car, and that he had fallen off from there, not on the right-hand side of the train, but on the left-hand side of the train, between the two tracks.

I recite that to your Honor for the purpose of showing to your Honor that the case was defended and submitted on that *that* ground. The jury found for us and I should have been confident on making the same proof to get the same result before any fair jury. In my opinion, the case was correctly decided by the jury.

In the second case, the Merritt case, that was referred to this morning by the witness——

The Court: Who was that?

A. That was Mr. Hildebrand.

Mr. Spivock: If your Honor please, I suggest that counsel give us just a brief summary.

The Court: I would also think that that request was appropriate. Be as brief as possible, Mr. Dunne.

A. I am sorry I had to be somewhat lengthy about the other case.

The Marritt case was a case where some unknown person at the Ferry Building in San Francisco, in the premises assigned to the Southern Pacific Company, in the waiting room, had dropped a bottle of whisky, which broke, and the floor, which was a tile floor, became wet; the janitor immediately started cleaning up the mess and mopping up, and it was while he was in the process of doing that the woman in the case, the plaintiff in the case, walked through that; it was perfectly open to her observation, and she slipped and fell. It was submitted to the jury upon the [fol. 131] ground of contributory negligence, and the jury returned a verdict for the defendant. I would have been confident of putting that case before any fair jury.

That is all.

Cross-examination.

Mr. Spivock:

—. I would like to ask with reference to the occupation of some of these jurors. I notice quite a number of them are business men, as you stated, but one you stated was an employee of Armour & Company. Would you know

whether he is a manager, or executive, or whether he is just a humble employee of Armour & Company?

A. My recollection of that particular individual was that he was not an executive in the sense that he was the chief or one of the chiefs in charge of Armour & Company's office out here, and it is also my recollection that he was not a laborer; he was not a meat cutter or anything of that sort. I would say that he was an employee of Armour & Company, he had a fairly good job.

Q. I also notice that there were quite a number of insurance brokers and insurance men on the list which you gave.

A. My recollection is not sufficient to go beyond the note that I have, that one was connected with the Equitable Life Insurance Company and the other was connected with the Connecticut Mutual Life Insurance Company. My recollection is that they were not managers of the company, but it does not go beyond that.

Q. But is your recollection to the extent that they were more than mere humble employees, or working in some small positions for the insurance companies?

A. My recollection will not permit me to answer that question. My recollection of those men is that they seemed [fol. 132] to have what I would say was a fair job, although they were not the top men in their organization. I could not give you more detail than that.

Q. Isn't it common knowledge to yourself, as well as to other members of the bar, Mr. Dunne, that the type of jurors in the Federal courts is altogether different from the type of jurors in the State courts?

A. To that question I would say no.

Q. In other words, in your discussions with other attorneys you have not formed that opinion that there is more of the business man and wealthier type of jurors in the Federal court than there is in the State court?

A. If you are asking me for my opinion, there are more men——

Q. There are more of the wealthier class business men on the juries in the Federal court by far than there are in the State courts?

A. I will have to qualify that by putting it this way, it is my experience that with juries in the State courts there are more older people who are retired, and that that makes

perhaps a difference in percentage, but that among those who are younger and are not retired I would say in my opinion the proportion, as far as my observation goes, of men who were employed in insurance companies, banks, investment houses, concerns of that sort, is about the same.

Q. Do I understand that you have talked with any number of attorneys about that, or haven't you had occasion to?

A. I have talked to some, not a great many, I don't think.

Q. I would like to ask you, isn't it the fact or don't you know it is a fact that it is common opinion among attorneys in San Francisco that it is much more difficult for a plaintiff to win a personal injury case in the Federal court than [fol. 133] in the State court on the same facts?

A. I don't know that that is the fact.

Q. Isn't it a fact, Mr. Dunne, that the case of Thiel v. Southern Pacific Company was filed in the State court?

A. Yes.

Q. And you transferred it over into the Federal court?

A. I did.

Q. And it went up to the Supreme Court?

A. You applied to the Supreme Court for certiorari and the Supreme Court denied your application.

Q. And the appeal I took and the efforts I made to have the case transferred to the State court were most vigorously contested by you?

A. I did my very best.

Q. There were lengthly briefs filed?

A. Yes, I think I briefed the case adequately.

Q. Is that the common practice in all cases filed against the Southern Pacific, you immediately move them into the Federal court?

A. You are asking for my personal practice, yes, if the case is removable, we have the right under the Federal statute to remove it into the Federal court, we do so.

Q. Isn't that because of the rule of the Federal court that you must have an unanimous verdict of twelve people, but on the other hand in the State court all you need is nine jurors, which makes it more difficult for the plaintiff to recover? Aren't you influenced to a large degree by that in the Federal court?

A. You say am I influenced by that?

Q. Yes.

A. No, I cannot say that I am, but I would have you qualify that. I have to say this, it has been my opinion, I have always felt that Federal court jurors are very fair [fol. 134] jurors. I have personally always been satisfied with them. You have asked me for the reason of the removal of cases to the Federal court. There is a second reason, I am not sure that it is valid, but lawyers generally seem to think that if you are defending a case it is better to have the requirement of a unanimous verdict. In all my personal experience I have never tried a case in this Federal court where a verdict was returned that it made any difference whether you had a unanimous verdict or a verdict of nine out of twelve. The case in which the jury was divided nine to twelve is the only case I can think of where the numerical difference would result in a hung jury rather than a verdict.

Q. Confining ourselves to personal injury cases, that type of case that we are concerned with here, you are not influenced primarily by the fact that a unanimous verdict is required in the Federal court rather than nine out of twelve in the State court?

A. I would say that was not the sole consideration.

Q. Let me ask you, during the past nine years have you lost a jury case in the Federal court, that is, a final judgment, not an intermediate verdict?

A. I have no recollection of having a final judgment against me in any type of case in the United States District Court for the last nine years. I may be mistaken about that, but if I am I do not recall it.

The Court:

Q. Did you ever settle a case?

A. A great many.

Mr. Spivock:

Q. You have tried in that period of nine years at least twelve jury cases, or more than that, haven't you?

[fol. 135] A. I take it that is correct, that I have tried more than twelve.

Q. The last jury case that you tried was Barton v. Southern Pacific Company, about a year and four months ago?

A. I am not sure that that is the last one.

Q. You have not any recollection?

A. I think there was a case since then.

Q. You have no recollection of any personal injury trial that you tried in the last year in the Federal court?

A. Jury?

Q. Yes.

A. No, I have not in the last year.

Q. You have settled quite a number of cases in that time?

A. Yes, I have settled quite a number.

Q. Didn't the attorneys indicate to you they did not have a chance to win if they try them?

A. Yes, they indicated to me they did not have a chance in the State court.

Q. So that they settled?

A. They said they did not have a good case and we could make a settlement. With lawyers who do not make it a business of rounding up cases against the Southern Pacific we may settle with them, but if you have lawyers that make a business of rounding up business of that sort, or filing cases for the purpose of attempting to get a nuisance sort of settlement we very often go to trial with those cases, even though we could settle them for very much less than going to trial.

Q. There is no insinuation that I go around and do that?

A. As far as I know, Mr. Spivock, I may be mistaken in this, so far as I know this is the first case you have had against the Southern Pacific Company.

[fol. 136] Q. In twenty years in the State court you have tried many cases also, have you not?

A. That is correct.

Q. And you have lost some of those, of course?

A. My recollection now is in San Francisco I have lost none except Federal Employers Liability Act cases, with the exception of one.

Q. The case you had against Mr. Hallinan?

A. That was not a personal injury case.

Q. I was not referring specifically to that, but all cases you have lost in the State court in recent years.

Q. No, in that same period there is this case which is pending on appeal, and with the exception of the Federal Employers Liability Act cases where we do not have the defense of contributory negligence, I can think of only one.

The Court: Step down.

Mr. Dunne: The defendant rests on the matter of this motion.

Mr. Spivock: No further rebuttal.

The Court: Is there any further rebuttal?

Mr. Spivock: No further rebuttal.

The Court: You rest, now, do you?

Mr. Spivock: The plaintiff rests.

The Court: I wish you gentlemen to have an opportunity to argue this. I would like you to do it this afternoon.

[File endorsement omitted.]

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[fol. 137] In United States District Court

[Title omitted]

Order Denying Plaintiff's Motion to Strike Entire Jury Panel—November 9, 1942

Plaintiff's motion to strike out or quash the entire jury panel of this Court came on this day to be heard. Allen Spivock, Esq. appeared as attorney for plaintiff and in support of said motion, and Arthur B. Dunne, Esq. and Louis L. Phelps, Esq. appeared as attorneys for defendant. Mr. Dunne made an objection to the introduction of evidence in support of the motion to strike, which said motion was taken under advisement. Vincent W. Hallinan, Clifton Hildebrand, Walter B. Maling, and William C. Mikulich were sworn and testified on behalf of the plaintiff. Carl W. Calbreath and Arthur B. Dunne were sworn and testified on behalf of the defendant. After argument, [fols. 138-139] the motion was submitted to the Court for consideration and decision, and the same being fully considered, it is Ordered that said motion to strike out or quash the entire jury panel of this Court be and the same is hereby denied.

* * * * * * *

[fol. 140] IN UNITED STATES DISTRICT COURT

AMENDMENT TO COMPLAINT—Filed November 12, 1942

(Adding new paragraph VIIa.)

Now comes said plaintiff and, by leave of Court, files this Amendment to his Complaint herein, thus adding paragraph VIIa thereto as follows:

VIIa

That upon falling from said train, both of plaintiff's feet were cut off at the ankles and plaintiff sustained numerous other wounds about his head and body; that the agents of said defendant Company carried plaintiff back onto said train but negligently and recklessly failed to give him any first aid treatment and negligently and recklessly failed to carry any first aid equipment whatever on said train and negligently and recklessly failed to have on said train any doctor or registered nurse or anyone capable of giving first aid; that about one hour after said accident plaintiff was brought to Truckee, California, by said defendant Company and its doctor there negligently and carelessly failed to give proper medical attention to plaintiff's said wounds but left them in an extremely dirty condition and carelessly left old and dirty dressings thereon until plaintiff was brought back to said Reno some time later; that said negligence caused gas bacillus and other infections to set into said leg wounds, thus causing amputa-
[fols. 141-158] tions of plaintiff's legs which would not have been necessary if he had received proper first aid treatment and/or proper medical care shortly after said accident.

Allen Spivock, Attorney for Plaintiff.

[File endorsement omitted.]

* * * * * * *

[fol. 159] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRE-TRIAL CONFERENCE, SATURDAY, NOVEMBER 21, 1942, 10 A.M.

Counsel Appearing: For Plaintiff, Allen Spivock, Esq.; For Defendant, Arthur B. Dunne, Esq., and Louis L. Phelps, Esq.

Mr. Spivock: At this time plaintiff would make a motion to strike the demand for jury trial upon three grounds: All of the grounds set forth in the previous motion to strike the previous panel entirely; further, that the defendant did not demand a jury trial; and the third ground, that there are a great many complicated issues of law arising in this case which could be more expeditiously tried by the Court than by a jury.

The Court: Didn't the plaintiff demand a jury?

Mr. Spivock: Yes, the plaintiff did demand a jury.

The Court: I will hear what the defendant has to say about it. I always prefer to try cases like this before a jury. I guess if both sides insisted upon it, I might con-[fol. 160] sider it, but, somehow or other, Mr. Spivock, I have always felt that both sides in a personal injury case might be better off to have the fact issues tried by a jury.

Mr. Dunne: So that we may clear the record on that, your Honor, the Federal Rules of Civil Procedure are specific that when a demand for jury trial has been made by one party, the demand cannot be waived or withdrawn except by consent of the other party, and we do not consent.

Mr. Spivock: The rule does not say "must", but merely says "shall." I was reading some authorities this morning on it, and the proper procedure for the plaintiff, if he desires to dispense with a jury, is to make a motion to strike the demand for jury trial.

The Court: Do you agree with counsel that the rule provisions are now brought into operation, and if the other side opposes it, you agree with counsel in substance that the Court has no authority to strike it?

Mr. Spivock: As a general rule. That is the general rule, that if a demand has once been made by the plaintiff, the language says "shall."

The Court: I thought that both counsel might like to know what I personally thought about these matters. I am

a great believer in the jury system. I happen to be one judge who does not want ever to do anything to indicate that it is becoming in disfavor, and as far as I am concerned, I think the jury system is the strongest bulwark in our judicial system.

[fol. 161] Mr. Dunne: Rule 38, subdivision (d), the last sentence, says: "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." There is one thing at the outset—oh, I beg your pardon.

The Court: May I look at this?

Mr. Dunne: The last sentence of subdivision (d).

The Court: "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

Mr. Spivock: There is another rule, 39, if you will look at it.

The Court: "When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

"Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

[fols. 162-193] I wish it had said "on its own motion," but it did not.

I have more trouble in getting counsel to have a jury trial than I do in getting them to waive it. At home many times I suggest to counsel, when neither have demanded it, that the case ought to be tried by a jury, and it just happens to be one of my strong convictions, one of the strongest that I have about our judicial procedure, namely, that

litigants should have and exercise the right of trial by jury. It is something about the satisfaction that comes to litigants when the case is over, and my experience is, even though they may not be satisfied with the verdict, that they will more willingly acquiesce in the results of the verdict than they will in a decision by the judge. So, in view of the provisions of the rule, and of the lack of consent by the defendant, and also in view of the further belief of the Court that this case should be tried by jury, the motion to withdraw the demand——

Mr. Spivock: The motion to strike out the demand.

The Court: —the motion to strike out the demand is denied.

Mr. Spivock: May the record show there is no intent on the part of the plaintiff to waive any objection he has made to the entire jury panel previously that was stated as part of the motion?

The Court: Let the record show that.

* * * * * * *

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[fols. 194-195] In United States District Court

[Title omitted]

Order Denying Motion to Strike etc.—November 21, 1942

This case came on this day for a pre-trial conference and for hearing on defendant's motion to strike amendment to complaint, etc. Allen Spivock, Esq. appeared as attorney for plaintiff, and Arthur B. Dunne, Esq. and Louis L. Phelps, Esq. appeared as attorneys for defendant. Mr. Spivock made a motion to strike out plaintiff's demand for a jury trial. After hearing had, it is Ordered that said motion be and the same is hereby denied.

* * * * * * *

[fol. 196] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER IMPANELING JURY AND DENYING PLAINTIFF'S CHALLENGE TO JURY ETC.—November 24, 1942

This case came on this day for trial. Allen Spivock, Esq. appeared as attorney for the plaintiff, and Arthur B. Dunne, Esq. and Louis L. Phelps, Esq. appeared as attorneys for the defendants. Thereupon the Court Ordered that this case proceed to trial and thereupon the following persons, viz:

Eugene Morgan, Mrs. Catherine Hardiman, James A. Levensaler, Mrs. Phyllis B. Goeppner, Julian H. Hales, Frederick W. Knight, Frank C. Kugelberg, Frederick M. Hohwiesner, William H. Lutz, Herbert N. Bright, D. Richard Martens, Maurice A. Gale, twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Spivock entered a challenge to the jury as impaneled herein and made a motion to strike out the jury on the grounds [fols. 197-207] stated, and after hearing had, it was ordered that said challenge and motion be and the same are hereby denied. After hearing the attorneys, it was ordered that the objections to and the motion to strike amendment to complaint be and the same are hereby overruled and denied, and that defendant be allowed an exception to the ruling of the Court. After further hearing the attorneys, it was ordered that the amendment to complaint be deemed to be denied and answered. Mr. Spivock made a statement to the Court and jury on behalf of the plaintiff. Mr. Dunne made a statement to the Court and jury on behalf of the defendant. Gilbert E. Thiel was sworn and testified on behalf of the plaintiff. Mr. Spivock introduced in evidence Plaintiff's Exhibit No. 1. Ordered that the further trial hereof be continued until November 25, 1942, at 9:30 A. M., and the jury, after being duly admonished by the Court, was excused until that time.

[fol. 208] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING DEFENDANT'S MOTION TO DISMISS DEFENDANT'S MOTION FOR A DIRECTED VERDICT, AND PLAINTIFF'S MOTION FOR A DIRECTED VERDICT—November 27, 1942

The attorneys for the respective parties being present, Mr. Dunne made a motion to dismiss and/or motion for a nonsuit. After hearing had, it is Ordered that said motion be and the same is hereby denied. Thereupon, the parties hereto and the jury impaneled herein being present as heretofore, the further trial hereof was resumed.

* * * * * * *

[fol. 209] Mr. Dunne made a motion for a directed verdict in favor of the defendant, which said motion was ordered denied and an exception noted. Mr. Spivock made a motion for a directed verdict in favor of the plaintiff, which said motion was ordered denied and an exception noted. Ordered that the further trial hereof be continued until November 28, 1942, at 9:00 o'clock A. M., and the jury, after being duly admonished by the Court, was excused until that time. Further Ordered that the attorneys appear at 8:30 o'clock A. M. on said day for hearing on the objections to the proposed instructions to the jury.

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[fol. 210] IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT—Filed November 28, 1942

We, the Jury, find in favor of the defendant.

F. M. Hohweisner, Foreman.

[File endorsement omitted.]

[fol. 211] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 21780-W

GILBERT E. THIEL, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant

JUDGMENT ON VERDICT—Filed November 28, 1942

This cause having come on regularly for trial on the 24th day of November, 1942, being a day in the November 1942 term of said Court, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Allen Spivock, Esq. appearing as attorney for Plaintiff, and Arthur B. Dunne, Esq. and Louis L. Phelps, Esq. appearing as attorneys for the defendant, and the trial having been proceeded with on the 25th, 27th, and 28th days of November in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the Jury, find in favor of the Defendant. Fred M. Holwiesner, Foreman," and the Court having [fol. 212] ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action, and that defendant go hereof without day, and that said defendant do have and recover of and from plaintiff its costs herein expended taxed at $——.

Judgment entered this 28th day of November, 1942.

Walter B. Maling, Clerk.

[File endorsement omitted.]

[fols. 213-217] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION TO SET ASIDE VERDICT AND JUDGMENT FOR DEFENDANT AND TO HAVE JUDGMENT ENTERED FOR PLAINTIFF IN ACCORDANCE WITH HIS MOTION FOR A DIRECTED VERDICT, OR TO GRANT PLAINTIFF A NEW TRIAL HEREIN. (Rules 50(b) and 59.)—Filed December 7, 1942

Plaintiff respectfully moves this Court to set aside the verdict and judgment for defendant entered herein on November 28, 1942 and to have judgment entered for plaintiff in accordance with his motion for a directed verdict made herein at the conclusion of all of the evidence on November 27, 1942, or in the alternative to grant plaintiff a new trial, as provided in Rules 50(b) and 59 of the Federal Rules of Civil Procedure.

Motion to Set Aside Verdict and Enter Judgment for Plaintiff

Said motion to set aside said verdict and judgment and to have judgment entered for plaintiff in accordance with his said motion for a directed verdict is made upon the ground that the great preponderance of the evidence and defendant's *admissions alone* clearly show that plaintiff is entitled to prevail here on all of the three main issues presented at the pre-trial conference.

[fol. 218] MOTION FOR NEW TRIAL

Said motion for a new trial is made as to *each* of said three main issues and is made upon the following grounds:

1. Insufficiency of the evidence to justify the verdict for defendant. The above admissions alone show that there is no substantial evidence to sustain the verdict which is so manifestly and palpably against the uncontradicted evidence and contrary to the law applicable here.

2. Irregularities in the selection of the jury preventing plaintiff from having a fair trial by jury herein.

(a) Plaintiff's motion to strike out the entire panel. It should have been granted because the method of selection purposely excludes the great mass of citizens and purposely selects only those who *by reason of business position*

*or social relations* would *probably be friendly* to such a gigantic railroad corporation as the defendant. Large groups of working class people are purposely excluded and the very few who are selected cannot hope to overcome the influence of the great majority of jurors who are biased in favor of the defendant.

(b) Plaintiff's motion to strike out his demand for a trial by jury. It should have been granted, especially under the peculiar circumstances here, upon plaintiff's showing that he could not even hope to prevail in a trial by jury when the selection is made in such a highly *discriminatory* fashion.

(c) Plaintiff's motion to strike out the 12 jurors in the box at the trial. It should have been granted because it was [fol. 219] then clearly demonstrated beyond the question of a doubt that plaintiff's repeated charges and fears were *well founded* and it was then obvious that at least 8 of said jurors in the box had strong business ties or personal friendships with officials and agents of defendant Southern Pacific Company; that in particular, one juror admitted a personal friendship with Angus McDonald, recent president of defendant, and another admitted a personal friendship with F. S. McGinnis, vice-president of defendant, and another who later became the jury foreman admitted he played golf with and was friendly with officials of defendant; that of the 23 jurors examined herein, the shocking number of 17 of them admitted business or personal connections with defendant; that the court itself excused 6 because of large business connections with defendant or being a fraternity brother of defendant's counsel; that plaintiff peremptorily challenged 3 jurors because of admitted business connections with defendant, and if the law allowed further peremptory challenges, plaintiff would have been compelled to use so many that the panel would very probably have been exhausted; that defendant used but 2 peremptory challenges, one against an alleged friend of plaintiff's counsel, and the other against a juror apparently because she was a woman; that it became obvious that defendant had demanded the jury trial herein altho it is most unusual for a defendant to do so where a plaintiff is so seriously crip- [fol. 220] pled, because it was extremely confident that any

jury selected from said panel would contain enough of its friends who would prevent a verdict for plaintiff; that defendant well knew that no final judgment on a jury verdict in a personal injury action has been entered against it for the past nine years because the method of selection assures defendant of sufficient jurors who are friendly to it and who by reason of their business and social viewpoint do not favor the giving of damages in personal injury actions brought by poor persons; that in spite of said jurors' statements that they would be impartial, it is a well known trait of human nature that they would consciously or unconsciously tend to favor the Southern Pacific Company because of their social and continuous business relations with it as against the plaintiff who is utterly unknown to them and whose future is of no particular concern to them; that with full knowledge of all of the above and altho plaintiff had demanded and desired a trial by jury, plaintiff was compelled to and endeavored to dispense with a jury trial herein but was prevented by defendant who desired a jury trial.

3. Bias and prejudice of jury. Its rapid verdict in about ten minutes shows that the jury could not possibly have reasonably discussed and considered all of the three main issues in what was admittedly an important case. It shows that the jury prejudged the case by reason of their friendship and bias for defendant and their anti-damage claim [fol. 221] viewpoint to such an extent that they completely disregarded the uncontradicted evidence favorable to plaintiff on all or any of said three issues. The verdict is a gross miscarriage of justice and should not be permitted to stand.

* * * * * * *

[fols. 222-306] Said motions for directed verdict and for new trial are based upon all the pleadings, papers and records herein, upon all the testimony taken upon any motions, depositions and proceedings and the trial herein, upon all rulings of the Court and exceptions thereto and upon such oral and documentary evidence as plaintiff may offer at the hearing of said motions.

Wherefore, plaintiff prays that said verdict and judgment for defendant be set aside and that judgment be entered for plaintiff in accordance with his motion for directed verdict,

or in the alternative that plaintiff be granted a new trial on all or any of said three main issues.

Dated: December 7, 1942.

Allen Spivock, Attorney for Plaintiff.

Admission of Service.

[File endorsement omitted.]

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[fol. 307] IN UNITED STATES DISTRICT COURT

ORAL DECISION OF COURT ON MOTIONS

Be it remembered that the above entitled and numbered cause came on regularly for hearing on plaintiff's Motion to Set Aside Verdict and Judgment for defendant, and to have Judgment entered for plaintiff, in accordance with his Motion for Directed Verdict, or to grant for plaintiff a new trial herein, before the Honorable John C. Bowen, one of the Judges of the United States District Court for the Western District of Washington, Northern Division, and the Judge who tried the above entitled and numbered cause in the above entitled court, sitting in Department No. 1 of the United States District Court for the Western District of Washington, Northern Division, at the United States Court House, in the City of Seattle, County of King, State of Washington, at the hour of 10:45 o'clock A. M., March 20, 1943; plaintiff appearing by his attorney, Mr. Allen Spivock, and the defendant appearing by its attorneys Mr. Arthur B. Dunne, and Mr. Phelps; the court having heard oral argument by Mr. Spivock and by Mr. Dunne, and both sides having completed their said oral argument, at about the hour of 4:30 o'clock p. m., of said day, the Court rendered the following Oral Decision on said motion or motions, as follows, to-wit:

The Court: This case has presented a number of interesting points and a number of them are properly raised and considered in connection with the plaintiff's motion to set [fol. 308] aside the verdict and judgment for the defendant, and to have judgment entered for plaintiff in accordance with his motion for directed verdict, or to grant to plaintiff a new trial herein.

That motion, or motions, and each and all the parts thereof, the court understands have been fully argued and fully presented to the court here at this session today, and the court understands you now, both sides, have submitted that motion, or those motions, and each and all parts thereof, for the court's final determination at this time.

One point that has been mentioned a number of times during the progress of the proceedings, and in various briefs and papers filed by the parties, is that question which the plaintiff has raised concerning the legality of the jury panel and the legality of the jury sworn to try this case.

I have followed that question and have considered it on every occasion when it has been raised, with the same degree of thoroughness each time as if it had not been raised more than once during the progress of this case. It has commanded my attention all along, as I think it would that of any trial judge seeking to do his duty.

We are all solicitous for the application of all safeguards that will make for the just and impartial administration of the procedure of the courts at all times, and when any such question is raised naturally it is of interest, along with all the other questions presented in this case.

On the occasions previous to this, when that question was [fol. 309] raised, I made the rulings which I thought upon the consideration and information which the court then possessed should have been made upon the facts and the law and the justice of the situation.

Here again today I have carefully considered that question, among others, all over, anew and again. I have taken this opportunity at this hearing of reviewing the types of occupations of the jurors who were sworn to try this case, and I find that Juror No. 1, Mr. Eugene Moran, was a shipyard worker at the time he was called away from his work to serve on this case, and had been formerly a railway postal employee.

I find that Juror No. 2, Mrs. Catherine Hardiman, was the widow of a former clerk of the Associated Oil Company, and that Mrs. Hardiman herself, the juror, had never done any work or pursued any occupation other than that of homekeeper—that was the way she expressed it, I believe.

I find that Juror No. 6, Mr. Frederick W. Knight, was a salesman for a stationery business. I don't recall whether the proof went into a great deal of detail whether it was

office stationery—I don't know what other kind of stationery it could have been—but that was the impression I got at the time, that it was what we usually refer to as the stationery business, where office supplies and typewriting paper and carbon paper and things of that sort are sold, among other things. I believe he did some selling on the outside from what I recall of what he said. Selling and [fol. 310] soliciting sales is what I meant by the term "selling outside".

I find that Juror No. 9, William H. Lutz, was a retired steel erection man—that is, a working man when he worked.

I find that Juror No. 10, Mr. Herbert N. Bright, was a retired railway postal clerk; at the time of the trial employed as a custodian or janitor. I don't believe he used the word "janitor", but the way he spoke of his duties and in interpreting what he said in the light of what I have known of persons similarly employed, I think it is another word for janitor service. Anyway, he said he was now employed as a custodian of a Masonic Temple—he may have said "The Masonic Temple", meaning the one in San Francisco, if there is one leading and outstanding Masonic Temple there.

Now I call attention to those respective occupations of the five jurors above named as having a decided bearing upon the plaintiff's contention that, among this jury panel, and particularly this jury that was sworn to try this case, the plaintiff was prejudiced by reason of the fact that there was a noticeable absence of jurors of the working man or employee class, or wage earner class, as counsel in some connections stated it. And I believe it is appropriate to note that these five jurors whose names and occupations I have just mentioned, belong more closely and intimately with the working man and employee class than they do with any other class, and as to whether the twelve jurors were fairly representatives of the prevalent occupations we find these five jurors when compared with the others do not [fol. 311] belong to the same occupational class as the remaining seven jurors. Some of the remaining seven were business men, and I think one or two of them might be termed important business men, having important or leading or outstanding business connections.

I think that might be said of Mr. Maurice A. Gale, who was Juror No. 12, and also it might be said of Mr. Frank

Kugelberg, Juror No. 7, and also Juror No. 8, Mr. Hohwiesner, who I believe was the foreman of the jury.

As to others of the seven jurors it is not certain they were men of important business affairs. It is true Mr. Levensaler, Juror No. 3, was in the insurance business, but I personally did not get the impression he was in a managerial class.

Mr. Spivock: He was an insurance broker.

The Court: We do have Mr. Kugelberg, Mr. Hohwiesner and Mr. Gale who are admittedly important business men.

We have Richard Martens, Juror No. 11, who is a retired commission merchant. I don't know, and I don't believe the evidence discloses, what importance his financial standing or former business may be or may have been. Of course, one who is retired may be upon that status for many different reasons. It may be business failure or business success which made it possible for him to quit work, or it might be due to some change in his physical life or health. I don't know.

And we have another man, Juror No. 5, Julian H. Hales, who called himself a rice broker and accountant. And [fol. 312] again, we cannot tell without specific information as to the relative importance of his business compared with that of the so-called managerial or employer class of business. I had not previously regarded the usual run of accountants as being included in the managerial class. I regard them more as belonging to an independent calling like that of some professional man, such as a doctor or dentist or lawyer or any one in any professional independent calling.

So that upon those facts which I have observed in connection with the twelve jurors, or most of the twelve jurors who were sworn to try the case and who did try it, we find five of them who I think it may be fairly supposed would be expected to be sympathetic with the experiences in life, the affairs of life, and with the economic views, of people who belong to the working or employee class. I think that might be expected of those five of the twelve jurors.

It seems to me that that disposes of any just contention that these twelve jurors who decided this case were biased, or likely to be,—it being the effect of the contention of plaintiff's counsel that it is an inescapable conclusion

that the jurors were biased against plaintiff and in favor of defendant.

It seems to me these observations just made by me show such conclusion contended for by plaintiff's counsel is not only escapable but it is shown to be not true at least as to five of the jurors, and there is no showing of fact to support such conclusion as to the other jurors.

[fols. 313-320] There are many other points involved in this case. I think, however, it is not necessary, and I doubt if counsel wish the court to take the time, to discuss all of them. As to such remaining points it seems to me fair to observe that all other material questions of fact now presented on these motions were submitted to the jury. There was before the jury credible evidence amply sufficient to sustain the jury's verdict.

At this stage we must conclude from the verdict that the jury did believe that evidence, no matter whether there was opposing evidence or not.

All the vital questions of law now presented in support of these motions have been previously raised, considered and determined, and with such determination the court, after full discussion and further full consideration, is now satisfied.

The plaintiff's motion to set aside the verdict and judgment for the defendant, and to have judgment entered for plaintiff in accordance with his motion for directed verdict, or to grant plaintiff a new trial herein, and each and every part thereof will therefore be denied.

* * * * * * *

(Form of Order handed by bailiff to each of counsel).

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[fol. 321] IN UNITED STATES DISTRICT COURT

ORDER DENYING PLAINTIFF'S MOTION TO SET ASIDE VERDICT AND JUDGMENT—Filed March 20, 1943

Plaintiff's Motion to Set Aside Verdict and Judgment for Defendant and to have Judgment Entered for Plaintiff in Accordance with his Motion for a Directed Verdict, or to Grant Plaintiff a New Trial Herein, having come on this day regularly for hearing in open court at Seattle, the plaintiff being represented by his attorney of record, Mr.

Allen Spivock, of San Francisco, California, and the defendant being represented by its attorneys, Mr. Arthur B. Dunne and Mr. L. L. Phelps, both of San Francisco, California; and oral argument having been made upon said motions by such attorneys for each side; and said motions having been submitted for decision; and it appearing that all material questions of fact now presented in connection therewith were submitted to the jury; that there was before the jury credible evidence amply sufficient to sustain the jury's verdict; that the vital questions of law now presented in support of these motions have been previously raised, considered and determined; and that with such determination the court after full discussion by counsel and further full consideration is now satisfied; and the court being fully advised in the premises; now therefore it is hereby

Ordered that said motion or motions, and each and every part thereof, be, and they are hereby denied, to all of which rulings plaintiff excepts and his exception is allowed.

Done in open court at Seattle this 20th day of March, 1943.

(Sgd.) John C. Bowen, United States District Judge.

[fol. 322] [File endorsement omitted.]

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[fol. 323] In United States District Court

[Title omitted]

Order Denying Plaintiff's Motion to Set Aside Verdict and Motion for a New Trial—March 25, 1943

In accordance with a signed order this day received from Hon. John C. Bowen, United States District Judge, sitting at Seattle, Washington, the Judge who tried this case, it is Ordered that plaintiff's "Motion to Set Aside Verdict and Judgment For Defendant and to Have Judgment Entered For Plaintiff in Accordance With His Motion For a Directed Verdict or to Grant Plaintiff a New Trial" be and the same is hereby denied.

[fols. 324-337] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS—Filed June 18, 1943

Notice is hereby given that said plaintiff, Gilbert E. Thiel, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein on November 28, 1942 and from the whole thereof, and from the order entered herein on March 25, 1943 denying his motion to set aside the verdict and judgment for defendant and to have judgment entered for plaintiff in accordance with his motion for a directed verdict or to grant plaintiff a new trial herein and from the whole thereof.

Dated: June 18, 1943.

(Sgd.) Allen Spivock, Attorney for Plaintiff.

[File endorsement omitted.]

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[fol. 338] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL—Filed August 19, 1943

Comes now plaintiff who hereby states that he intends to rely upon the following points on the appeal filed herein on June 18, 1943:

* * * * * * * *

II. Irregularities in selection of jury preventing fair trial to plaintiff.

[fol. 339] A. Plaintiff's motion to strike out the entire panel was erroneously denied as the evidence plainly showed that the method of selection is wholly arbitrary and distinctly favors one class or group and was so intended.

B. Plaintiff's motion to strike out his demand for a jury trial was erroneously denied because plaintiff could not hope to get a fair trial by a jury drawn from said panel.

C. Plaintiff's motion to strike out the 12 jurors in the box at the trial was erroneously denied because plaintiff had exhausted his challenges and it then appeared that numerous

jurors were admittedly close friends of defendant and plaintiff could not get a fair trial from such a jury.

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[fols. 340-342] Dated August 18, 1943.
(Sgd.) Allen Spivock, Attorney for Plaintiff.

[File endorsement omitted.]

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[fols. 343-442] In United States District Court

Order Granting Plaintiff Leave to Prosecute Appeal in Forma Pauperis

Ordered:

Plaintiff's application of August 17, 1943, under 28 U. S. C. A. § 832, to prosecute an appeal of the above entitled cause to the Circuit Court of Appeals, without being required to prepay fees or costs or give security therefor is Granted.

Dated: August 20, 1943.

A. F. St. Sure, United States District Judge.

(Endorsed) Filed Aug. 20, 1943.

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[fol. 443] In United States District Court

[Title omitted]

**Transcript of Hearing—Examination of Jurors**

Tuesday, November 24, 1942.

Counsel Appearing:

For Plaintiff: Allen Spivock, Esq.

For Defendant: Messrs. Dunne & Dunne, by Arthur B. Dunne, Esq., and Louis L. Phelps, Esq.

The Court: Are the parties and counsel ready to proceed in the trial of Gilbert E. Thiel v. Southern Pacific Company?

Mr. Spivock: Plaintiff is ready.

The Court: And defendant is ready?

Mr. Dunne: Yes, your Honor.

The Court: The Clerk will call twelve jurors into the box.

The Clerk: Eugene Morgan, Mrs. Catherine Hardiman, Berwick B. Futernick, Mrs. Phyllis B. Goeppner, Frank O. Freese, Frederick W. Knight, William Kahn, Frederick M. Hohweisner, Percy W. Freise, Herbert N. Bright, Richard D. Martens, Maurice A. Gale.

(Thereupon the prospective jurors were sworn to answer questions as to their qualifications.)

[fol. 444] The Court: The plaintiff may at this time make a very brief statement of the nature of the case, so as to advise the jurors what the case is about, and thereby enable them to advise the court concerning the qualifications to sit as jurors in the case.

(Thereupon Mr. Spivock made an opening statement.)

The Court: Mr. Spivock, you may now, as attorney for the plaintiff, as such questions as you think apply to all of the jurors and then finally you may inquire of Juror No. 1, and then when you finish doing that I will give the defendant's attorney the right to inquire of the juror for cause.

Mr. Spivock: I might ask all of the jurors generally, is there any one of you employed, directly or indirectly, by the defendant Southern Pacific Company? If any of you are, will you please raise your hand so I can ascertain that? Have any of you any close relatives connected with the Southern Pacific Company, any relatives that are working or connected with the Southern Pacific Company? Do any of you have any business relations with the Southern Pacific Company, other than as passengers?

Mr. Percy Freise: I have business with them.

Mr. Spivock: I would like to ask all of the jurors, do any of you own any stock in the Southern Pacific Company? Do any of you own any stock in the Pacific Greyhound Company?

Mr. Maurice A. Gale: I do.

Mr. Spivock: You have stock in that company?

Mr. Gale: In the Greyhound.

Mr. Spivock: Are there any other jurors that own any stock in any corporation which is in any way connected or affiliated in any way with the Southern Pacific Company?

[fol. 445] Do any of you own stock in any railroad company, at all?

Mr. Dunne: That is immaterial.

The Court: The objection is overruled.

Mr. Spivock: If I understand it correctly, outside of this gentleman, Mr. Gale, there are none of the jurors that own any stock in the Southern Pacific Company or any of its subsidiaries, or any corporations directly or indirectly controlled by it, or as far as any other railroad corporation is concerned you do not own any stock in a railroad corporation?

Mr. Spivock: I think that completes the general questions.

The Court: You may inquire of Juror No. 1 any special questions that you think may be directed to him as an individual juror, and after you have done that I will give the defendant an opportunity.

A Juror: My firm does business with the company, that is, the firm for whom I work.

The Court: Are you Mr. Knight?

Mr. Knight: Yes.

The Court: What is the nature of that business, do you know?

Mr. Knight: I have nothing to do with it, never handled it at all.

The Court: Would that in any way embarrass you in the performance of your duties as a juror in this case?

A. No, not in the slightest.

The Court: You may now inquire of the jurors in the order in which they come in the box. As I have it, Mr. Morgan was first, and Mrs. Hardiman was the second juror called in the box.

Mr. Spivock: I will start with the gentlemen sitting in the back row, the first one. What is your name, please?

The Juror: Eugene Morgan.

[fol. 446] Mr. Spivock: What is your business?

Juror Morgan: I was at one time in the railroad service, retired, but at the present time working in Richmond Shipyard No. 1.

The Court: You are working in a shipyard?

Juror Morgan: Yes.

Mr. Spivock: I would like to ask you, Mr. Morgan, if the plaintiff shows in this case that he was suffering from

delirium tremens when he was accepted as a passenger by the defendant, Southern Pacific Company, with full knowledge of the conditions, and that no precautions were taken by the defendant company to protect it from harm, and the Court instructs you that this constitutes negligence by the defendant and calls for a verdict for the plaintiff, would you have any hesitancy in bringing in a verdict for the plaintiff?

Mr. Dunne: I object to that.

The Court: The objection is sustained. You cannot ask a prospective juror whether he will bring in a verdict under certain conditions. All you can do properly is ask whether he would consider that instruction along with the other instructions if the Court should give such an instruction.

Mr. Spivock: If instructions are given to you by the Court that certain acts would constitute negligence, and you are satisfied that the evidence shows that those certain acts have been committed by the defendant company, would you have any hesitancy in following the Court's instruction and bringing in a verdict for the plaintiff?

Juror Morgan: No.

Mr. Spivock: If it should be shown here that the plaintiff had the mental illness at the time when he was accepted as a passenger and that was known to the railroad company, [fol. 447] if it should be shown that that mental illness resulted from drinking previously, would the fact that the plaintiff became mentally ill through drinking alcoholic liquors in any way prejudice you against the plaintiff?

Mr. Dunne: I object to that question, your Honor.

The Court: That objection is overruled.

Juror Morgan: I would have to weigh the evidence.

The Court: If it should turn out and be made to appear in the evidence that plaintiff had been a drinking man at one time and that may have contributed in a certain way to his mental condition, would that prejudice you against the case and render you unfit to be a fair and impartial juror?

Juror Morgan: No.

The Court: If the evidence should disclose the plaintiff had been a drinking man at some time it might have some effect?

Juror Morgan: Yes.

The Court: You think if you were in the plaintiff's place suing the defendant instead of the plaintiff, and there was

in the jury box—whose attitude was like your attitude now is, you would not get a fair trial from that juror?

Juror Morgan: It is rather hard to decide. It might have some bearing.

Mr. Spivock: I challenge the juror for cause.

Mr. Dunne: I should like, if I may, to ask the juror a question.

The Court: You may.

Mr. Dunne: Mr. Morgan, do you mean any more than if it should appear that this man's injuries were the result of his own voluntary acts, in the excessive use of alcohol, that that would have some bearing on your consideration [fol. 448] of the whole case: is that all you mean?

Juror Morgan: Yes, it would.

The Court: Have you any way of stating in your own words what your attitude is, without a question?

Juror Morgan: If the man was incapacitated through the use of liquor it might.

The Court: That is not the point. The question is whether or not you have any prejudice against him because of the fact that he may at some time have used liquor to excess and might have adversely affected his health, it would not prejudice you?

Juror Morgan: No prejudice whatever.

The Court: You are absolutely certain you would not be prejudiced against him?

Juror Morgan: No, I would not.

The Court: I think, in view of the last answer, that the Court should overrule the challenge and deny the challenge.

Mr. Spivock: May I ask one more question?

The Court: You may inquire further.

Mr. Spivock: Mr. Morgan, this is what I am trying to point out, at the time the plaintiff was accepted as a passenger the plaintiff claims he was mentally ill, in an abnormal state of mind, which was known to the railroad company at the time they sold the ticket to him, and the question I asked you was if the mere fact that the plaintiff had been drinking excessively alcoholic liquor a few days before, which caused him to get into this abnormal state of mind, would there be any prejudice in your mind because of that?

Juror Morgan: No, there would be no prejudice.

Mr. Spivock: Then, to get it clear, as far as you are concerned, if the plaintiff was out of his mind at the time

[fol. 449] he was accepted by the railroad company, regardless of how it came about, you would still believe that the railroad company, knowing the man was out of his own mind, should have exercised some care under the circumstances?

Mr. Dunne: That is an incorrect statement of the law.

The Court: The objection is sustained.

Mr. Spivock: If I may reframe the question, what I am trying to make clear, Mr. Morgan, is, the fact that he had been drinking previously, a few days before, that caused him, at the time he bought his ticket, to be in an abnormal state of mind, having delirium tremens, the mere fact that the condition he was in was caused by drinking, would that prejudice you against the plaintiff?

Juror Morgan: No.

The Court: I want to say to all of the jurors what counsel is inquiring about is, he is not asking you what your decision is going to be on a supposed state of facts, but it is a question of what your attitude is toward the case, and whether or not by reason of the circumstances related in the questions you would have any prejudice in the case, whether you are biased or unfair, in favor of or against either of the parties to commence with. That is the point of his inquiries.

Mr. Spivock: I have finished with Juror No. 1, Juror No. 1 is passed for cause.

The Court: The defendant may proceed and ask general questions of all of the jurors, and then you can specifically make inquiry of Juror No. 1.

Mr. Dunne: Yes, your Honor.

Are any of you acquainted with Mr. Thiel, the plaintiff in this case?

[fol. 450] Mr. Dunne: I think that will be all the general questions at this time. Mr. Morgan, if his Honor should instruct you that the effect of voluntary intoxication does not excuse a man for conduct, voluntary conduct on his own part, that brought about injury to him, would you have any difficulty in following that instruction?

Mr. Morgan: No.

Q. Have any members of your immediate family ever suffered injury in a railroad accident?

A. No.

Q. Have you ever, yourself, had any difficulty with the Southern Pacific Company?

A. No, I was sent out on railroad service and I served my time.

Q. That is, United States Railway Mail Service?

A. Yes.

Q. What I want to know is whether or not you can be fair and impartial to both sides. Do you feel that you can be that kind of juror?

A. Yes.

Mr. Dunne: I have no further questions.

The Court: You may inquire for the plaintiff of No. 2.

Mr. Spivock: What is your name?

Juror Hardiman: Mrs. Catherine Hardiman.

Q. What is your business?

A. Housewife.

Q. You have heard the nature of the questions that I have asked the other juror, with reference to whether you have any prejudice against a man who became mentally ill or abnormally ill before he is accepted as a passenger? Would there be any prejudice in your mind because that man's illness resulted from intoxicating drink of alcoholic liquors?

A. No, I would not be prejudiced.

Q. If the Court should instruct you that if a man is mentally ill and accepted by the railroad with full knowledge that he is mentally ill, would the mere fact that his illness [fol. 451] may have resulted from his excessive drinking of alcoholic liquor, would you follow the Court's instruction on that?

A. Yes, I would.

Q. Is there any reason that you know of why you could not give a fair trial to the plaintiff in this case, as well as to the defendant?

A. No, there is no reason.

Q. If it happened that it was a case brought by yourself against the defendant Southern Pacific Company would you be satisfied to have your own case tried by twelve jurors in your present state of mind?

A. Yes.

Q. You are a widow. What was your husband's occupation in his lifetime, what kind of work did he do?

A. He was a clerk.

Q. How long has he been deceased?

A. Going on five years.

Q. Have you had any occupation since that time other than the occupation of housewife?

A. No.

Q. I might ask one more question. Are there any of the officials of the Southern Pacific Company that you are acquainted with, at all?

A. Not a one.

Mr. Spivock: Pass the juror.

The Court: You pass this juror?

Mr. Spivock: Yes.

The Court: The plaintiff passes this juror for cause. The defendant may inquire.

Mr. Dunne:

Q. Mrs. Hardiman, have any of the members of your immediate family ever been injured in a railroad accident?

A. No.

Q. Have you, yourself, had any difficulty with the Southern Pacific Company?

A. No.

Q. It will appear in this case that the plaintiff has been rather severely injured. It is not my business to indicate to you what instructions his Honor will give the jury; those [fol. 452] matters are entirely in his Honor's hands, but I think I can anticipate that his Honor will instruct you that your verdict in this case must be based on the evidence and on the instructions, and considerations of sympathy are to be excluded. Anybody would be inhuman not to have some sympathy for an injured man. In your consideration of this case, however, and in deciding the question of liability in this case, do you think you could decide it by putting aside any consideration of sympathy or charity?

A. Yes.

Q. You think you could decide it solely upon the evidence and upon the Court's instructions?

A. Yes.

Q. Does any reason occur to you why you could not be perfectly fair to both sides in this case?

A. No.

Q. If you were in my position, would you be satisfied to submit your case to twelve jurors in your present frame of mind?

A. Yes.

Mr. Dunne: I have no further questions.

The Court: You may inquire of the next juror.

Mr. Spivock: Mr. Futernick, we have had acquaintance for several years in a fraternal organization?

A. Yes.

Q. Do you feel that your acquaintance with me would influence your judgment one way or the other in deciding this case?

A. No.

Q. What is your business?

A. Bookbinder.

Q. If the court should instruct you that a railroad owes a special duty of care and protection when it knowingly accepts a passenger who is mentally ill, would you follow the instructions of the Court?

A. Will you repeat that question?

Q. If the Court instructs you that the railroad has a special duty of care to a mentally ill person, even an intoxicated person, knowing it when he is accepted as a passenger, would you follow the instructions of the Court?

A. Yes.

[fol. 453] Q. If the Court instructed you that a railroad owes special care and protection to a passenger whom it accepts knowing that he is mentally ill or out of mind, if the Court so instructs you, would that instruction be followed by you?

A. Yes.

Q. Is there any reason why you know of why you could not give either side a fair and impartial trial in this matter?

A. No.

Mr. Spivock: Pass the juror.

Mr. Dunne: In this case, do you think that you could be a fair and impartial juror to both sides?

A. Yes.

Mr. Dunne: I have no further questions.

The Court: The next juror.

Mr. Spivock: Mrs. Goeppner, what is your business?

A. Housewife.

Q. What is your husband's business?

A. Florist.

The Court: Where does he have his place of business?

A. He is a partner in Podesta & Baldocchi, 224 Grant Avenue.

Mr Spivock:

Q. Does your husband's firm have any business with the Southern Pacific Company?

A. I believe that he has.

Q. Are you acquainted with any of the officials of the Southern Pacific Company?

A. I am not.

Q. Do you know whether your husband is acquainted with any of them?

A. I don't know.

Mr. Dunne: I think, if your Honor please, in view of the line of questions that counsel is putting, it is fair to say that I have a charge account at Podesta & Baldocchi's.

Mr. Spivock:

Q. Mrs. Goeppner, is there any reason that you know of, keeping in mind the fact of what *you* have just told you, why, after hearing the evidence here, that you cannot give a fair trial to the defendant, or to the plaintiff in this matter?

A. There is not.

[fol. 454] Q. Do you feel in your own mind that there would be nothing influencing you one way or the other outside of the actual evidence in this case?

A. That is all.

Q. So as to make your position in this case clear, your verdict would be based entirely upon the evidence and the Court's instructions, and not outside matters or business relations?

A. That is right.

Q. If the Court should instruct you that when a man who is mentally ill appears at a station for the purchase of a ticket and the ticket seller is told that the man has been acting crazy and is afraid someone is trying to kill him, and the Court instructed you that under those circumstances it is the duty of the railroad to make inquiry as to

whether he could be carried safely, would you follow that instruction?

A. I would.

Q. Would you have any prejudice against the plaintiff because of his mental illness at the time he was accepted as a passenger resulting from excessive drinking of liquor a few days previous from his disappointment from a recent marriage?

A. No.

Q. I would like to ask you finally, do you feel absolutely sure in your own mind that you could give the plaintiff and the defendant a fair trial on the merits, without any outside influence of any kind?

A. Yes.

Mr. Spivock: Pass the juror.

Mr. Dunne:

Q. And if the Court should instruct you in this case that a man cannot excuse the results of his own voluntary acts, because he has been drinking, or is suffering from the effects of the excessive use of alcohol, would you follow such an instruction?

A. I would.

Q. Now, a number of questions have been put to you and with those questions in mind, do you think that if selected [fol. 455] in this case you could be a fair and impartial juror?

A. Yes.

Q. Would you be satisfied to submit it to a jury of twelve people in your present frame of mind?

A. Yes.

Q. You think you could decide this case wholly upon the merits as developed by the evidence and by the instructions of the court, without regard to any other consideration?

A. I do.

Mr. Spivock: Might I ask one more question?

Q. I represent the plaintiff here. Would you be perfectly willing, with that responsibility, to submit this case to twelve jurors in your present state of mind?

A. Yes.

Mr. Dunne: Counsel has referred in some little detail to the injury suffered by the plaintiff. Would you be inclined

to favor the plaintiff's case more, give more consideration to it because he was seriously injured than if that injury had only been slight?

A. No.

Q. In other words, you could decide the question wholly apart from whether his injuries were severe or slight?

A. Yes.

Mr. Dunne: I have no further questions.

The Court: You may inquire of the next juror.

Mr. Spivock: What is your name?

A. Freese.

Q. What is your business?

A. I am with Bancroft-Whitney Company.

The Court: In what capacity?

A. I am in the sales department.

Q. What is your position, do you go out and solicit orders for books?

A. No, I do not, I have charge of the sales inside of the house.

Q. You have charge of what?

A. Of the sales department, filling orders, etc.

Mr. Spivock:

Q. Are there many books that you sell to the Southern Pacific Company?

A. Not very many.

[fol. 456] Q. Have you sold any books to Mr. Dunne?

A. I don't know him.

Mr. Dunne: Might I say that it is a fact that Bancroft-Whitney have sold law books to me.

Mr. Spivock:

Q. You do not keep track of everybody, do you?

A. No.

The Court: Have you sold any to Mr. Spivock?

A. I can say no.

The Court: I suppose they sell books to all the lawyers they can.

Mr. Spivock:

Q. The fact that your firm does business with the Southern Pacific Company and has sold law books to Mr. Dunne, attorney for the defendant, Southern Pacific Company, would that influence your judgment in deciding this case?

A. Not at all.

Q. Let me ask you, if you had the responsibility I now have as attorney for the plaintiff in this case, who is in a very serious crippled condition, would you be satisfied in the trial of this case to have twelve jurors in your state of mind?

A. I would.

Q. You feel absolutely satisfied in your own mind that any business relations that you had with Mr. Dunne or with the Southern Pacific Company would not in the slightest degree affect your judgment?

A. Not at all.

Q. You have heard the questions I have asked the other jurors regarding the condition of the plaintiff at the time he went to the Reno station for the purchase of a ticket from the Southern Pacific Company, and would your answers be the same? In other words, would there be any prejudice in your mind, at all, against the plaintiff if he was mentally ill at the time he went to buy a ticket, because of some illness that was brought about by drinking a few days before, on account of disappointment with his marriage?

A. No.

[fol. 457] Q. This final question: If you were in the position of the plaintiff in this case, would you be entirely satisfied to have twelve jurors in your present state of mind to try your case?

A. Yes, I would.

Mr. Spivock: We pass the juror.

Mr. Dunne:

Q. Have you ever had any trouble with the Southern Pacific Company?

A. Not that I know of.

Q. Or have any members of your immediately family been injured in a railroad accident?

A. No.

Q. Can you think of any reason why, if you were selected here, you could not be a fair and impartial juror?

A. No.

Mr. Dunne: I have no further questions.

The Court: The next juror.

Mr. Spivock: What is your name?

A. Mr. Knight.

Q. What is your business?

A. I am with Schwabacher-Frey.

Q. You have stated your firm does business with the Southern Pacific Company?

A. Yes.

Q. What sort of business is it?

A. Selling materials.

Q. Are you doing that business all the time?

A. I am not, no.

Q. I mean is your firm doing that business all the time?

A. I presume they are, although I don't know.

Q. Are there any sales that you personally have with any agents of the Southern Pacific Company?

A. No.

Q. The business is not done by you at all?

A. No.

Q. It is done by the firm?

A. It is not done by me, at all.

Q. Are you acquainted with any officials of the Southern Pacific?

A. No, I am not. I did know some sometime ago but it has been quite a long time ago.

Q. At the present time are there any people working for the Southern Pacific that you know, personally?

A. No.

[fol. 458] Q. Would you be satisfied to have this case tried by twelve jurors in your present frame of mind?

A. I would.

Q. You feel absolutely certain that you would not be swayed in any way by reason of any business connection of your firm?

A. I would not be swayed at all.

Q. You feel absolutely sure that you could give the plaintiff a fair trial in this matter?

A. I do.

Mr. Spivock: I will pass the juror.

Mr. Dunne:

Q. Can you think of any reason why, if selected as a juror, you could not be perfectly fair, as far as both sides are concerned?

A. I don't know of any reason.

Mr. Dunne: I have no further questions.

The Court: The next juror.

Mr. Spivock: Mr. Kahn, what is your business?

A. Insurance broker.

Q. Do you d oany business with the Southern Pacific Company?

A. No.

Q. Are you acquainted with any of the officials of the Southern Pacific Company?

A. Well, I am acquainted with Blue, of the Traffic Department.

Q. How well are you acquainted with him?

A. I met him about a year and a half ago.

Q. How did you happen to become acquainted with him?

A. In the nature of our business, we are handling some of his personal fire insurance.

Q. In other words, you are handling some insurance business for him?

A. Yes.

Q. By reason of that connection that you have with an official of the Southern Pacific Company, would that in any way prejudice you against the plaintiff's case here?

A. None, whatever.

[fol. 459] Q. Would that have any tendency to make you favor the defendant Southern Pacific Company?

A. Not at all.

Q. Let me ask you, if you had the responsibility that I have of selecting a jury to try a case for the plaintiff against the Southern Pacific, would you be absolutely satisfied to have twelve jurors in your present frame of mind try the case?

A. I would.

Q. You think you could give the plaintiff a fair trial?

A. Yes.

Q. Your business connections that you have with the defendant company would not influence you in any way, at all?

A. Not at all.

Q. If the Court should instruct you where a mentally ill person is accepted by the railroad company with full knowledge that he is ill or acting crazy, and the court instructed you that the railroad had a duty to give care and protection to that person, would you follow that instruction?

A. I would follow the Court's instruction.

Q. And the other question that I asked the other jurors about being prejudiced because of the previous condition that caused him to lose his normal mind, would that in any way prejudice you against the plaintiff?

A. Not at all.

Q. Then you are perfectly sure, are you, in your own mind, that you would be perfectly satisfied, to have your case tried for you as plaintiff suing the Southern Pacific Company by twelve jurors in your present frame of mind that you are now in?

A. I would.

Mr. Spivock: I pass the juror.

Mr. Dunne:

Q. Mr. Kahn, various questions have been put to you as to what the Court might or might not instruct, let me put this question to you: If you were selected as a juror in this case would you follow the Court's instructions, whatever they might be?

A. Yes, I would. I would feel that it was my duty to [fol. 460] follow the Court's instructions.

Q. You will take the law from the Court, just as counsel would take their law from the Court?

A. I would.

Q. And so far as the facts are concerned, you will wait until you have heard them before you make up your mind?

A. I would wait until I heard the evidence.

Q. Just one other question: Can you think of any reason, or has any reason been suggested to you why you can't be perfectly fair to both sides if you were selected as a juror in this case?

A. I think I could be fair.

Mr. Dunne: That is all.

The Court: The next juror.

Mr. Spivock: Mr. Hohweisner, what is your business?

A. Insurance broker.

Q. Have you had any business relations with any one of the Southern Pacific Company?

A. No.

Q. Have you handled any insurance for anyone working for the Southern Pacific Company?

A. Not that I recall.

Q. If I were to ask you the same questions that I asked the other jurors would your answers be about the same, that is, would you have any prejudice against the plaintiff because the circumstances which brought about his mental illness?

A. No, I would not.

Q. If the Court instructed you that the defendant owed a special duty to a passenger that they knew to be out of his normal mind, would you follow the Court's instruction.

A. I would follow the Court's instruction.

Q. Is there any reason that you know of why you would not be able to give an absolutely fair trial to the plaintiff or to the defendant in this case?

A. I happen to have several friends among the officials of the Southern Pacific Company who are members of my [fol. 461] golf club, but that would not influence me.

Q. In other words, you are acquainted with some of the officers of the Southern Pacific Company?

A. Yes.

Q. How well acquainted are you with them?

A. Just through meeting them at the golf club.

Q. You feel definitely satisfied in your own mind that the mere fact that you met them socially or played golf with them would not affect you one way or the other in deciding this case, would not influence you?

A. I do not think it would.

Q. In other words, you are absolutely satisfied that you would decide this case on the evidence and the instructions, and the mere fact of the acquaintance would not influence your judgment one way or the other?

A. Yes.

Mr. Spiyock: I pass the juror.

Mr. Dunne:

Q. Can you think of any reason why you would have any prejudice or feeling against the Southern Pacific Company?

A. No.

Mr. Dunne: I have no further questions.

The Court: The next juror.

Mr. Spivock: Mr. Freise, do you do business with the Southern Pacific Company?

A. We do.

Q. What kind of business do you do?

A. We sell drawing material and blueprint material to the Southern Pacific, and I am acquainted with the head of the purchasing department.

Q. You are acquainted with the head of the purchasing department?

A. Yes.

Q. Are you acquainted with any other officials of the Southern Pacific Company?

A. I am not.

The Court: Pardon me, what kind of business did you say you were connected with?

[fol. 462] A. Drawing materials, surveying instruments, blueprint material.

By Mr. Spivock:

Q. About how much business do you do with the Southern Pacific Company?

A. I imagine a few hundred dollars a month.

Q. That business is handled personally by you with the purchasing agent?

A. Not exactly, but I have charge of the business, I have charge of the correspondence.

Q. The plaintiff, here, as you know, is in a very serious condition, and he is suing the Southern Pacific Company for damages because of injuries incurred while he was a passenger on this train. Would the fact that you are doing business with the Southern Pacific Company make you favor the Southern Pacific Company?

A. No, not at all.

Q. In other words, you are absolutely certain in your own mind that the mere fact that you are doing business

with the Southern Pacific Company would not sway you one way or the other in this case?

A. It would not, no, definitely no.

Q. Would you feel at all if you brought in a verdict for the plaintiff that would have a tendency to destroy your good will that you have with the Southern Pacific Company?

A. Oh, no.

Q. In other words, your present state of mind is you feel satisfied that if the evidence favored the plaintiff here you would bring in a verdict for him, regardless of whether you lost your business from the Southern Pacific Company?

A. That would not have any effect on me.

Q. You are sure in your mind that the business relations, or the possibility that your business might be cut off would not have the slightest influence upon your decision?

A. Yes.

Q. I have a very serious responsibility here, as I have pointed out, representing a man who is very seriously [fol. 463] injured, and will be for the balance of his life, and I would like to ask you if you were in my position and you were selecting a jury and this case was to be submitted to that jury, would you be satisfied if you were in my position to have the case tried by twelve men in your present frame of mind?

A. I believe I would.

Q. Are you absolutely satisfied about it?

A. Yes.

Q. You are absolutely satisfied in your present frame of mind you could give the plaintiff a fair trial?

A. Yes.

Q. And if the evidence favored the plaintiff you would not hesitate to bring in a verdict for plaintiff?

A. That is right.

Mr. Spivock: Pass the juror.

By Mr. Dunne:

Q. If the evidence favored the defendant would you have any hesitancy in bringing in a verdict for the defendant?

A. None.

Q. Can you think of any reason why you could not be as fair to one side as the other?

A. No.

By Mr. Spivock:

Q. How about the other question I asked the other jurors, whether there would be any prejudice in your mind because of the circumstances that brought about the mental illness, would that tend to prejudice you against the plaintiff?

A. Not at all.

Q. If the Court instructs you that where a railroad knowingly accepted a man who is mentally ill, having knowledge of his physical state of mind, and acting crazy, that they must exercise special care over him, would you follow such instruction?

A. I would, if there was such instruction.

The Court: The next juror.

By Mr. Spivock:

Q. What is your business, Mr. Bright?

A. I am a retired railroad postal clerk.

Q. Have you any acquaintances in the Southern Pacific Company?

[fol. 464] A. Well, I know Mr. Goldsmith for some years, and I was quite well acquainted with Mr. Hastings, I have not seen him for quite a number of years.

Q. Do you feel that your acquaintance with those people who are employed by the Southern Pacific Company would in any way have a tendency to bias you so that you would favor the Southern Pacific Company?

A. No.

Q. In other words, you are absolutely sure in your own mind that the mere fact that you know those people would not have any tendency to sway you as far as deciding the case on the actual evidence and the instructions of the Court is concerned?

A. Yes.

Q. You have heard the other questions that I have asked the other jurors about whether you have any prejudice, and your answer would be the same?

A. Yes.

Q. And you are absolutely satisfied if you were the plaintiff in this case against the Southern Pacific Company to have your case tried by twelve jurors in the same frame of mind that you are?

A. I would.

Mr. Spivock: I pass the juror.

By Mr. Dunne:

Q. Mr. Bright, if you were representing the defendant would you be satisfied to have twelve men on the jury like yourself?

A. Yes.

The Court: The next juror.

By Mr. Spivock:

Q. What is your business, Mr. Martens?

A. I am retired.

Q. What did you used to do?

A. I was in the commission business.

The Court: Handling products on a commission basis?

A. Yes.

By Mr. Spivock:

Q. Did you have any business with the Southern Pacific Company?

A. Many years ago I did.

[fol. 465] Q. But of late years have you had any business dealings with them?

A. No; not for ten or twelve years.

Q. Are you personally acquainted with any of the officials or people working for the Southern Pacific Company?

A. At the present time, no.

Q. Is there anything that you know of why you would not be able to give both sides a fair and impartial trial in this case?

A. No.

Q. Do you have any prejudice against the plaintiff because of his excessive drinking before he came to the station and bought a ticket and was in a bad state of mind at that time?

A. No.

Q. If the Court instructs you that where a prospective passenger comes to a ticket office of a railroad company and the ticket seller knows that the man is out of his mind and acting crazy, and that he was so informed by people who were with him, and the court instructs you that the railroad has a right to refuse to take him as a passenger,

and it does take him as a passenger and owes him special care, would you follow the instructions of the Court?

A. I would follow the instructions of the Court and the evidence.

Q. The evidence and the instructions of the Court?

A. Yes.

Q. Is there any reason that you know of in your own mind why you could not give the plaintiff a fair trial?

A. I will give him a fair trial.

Mr. Spivock: I will pass the juror.

By Mr. Dunne:

Q. Mr. Martens, if the Court did not instruct you as counsel has just stated you would disregard the statement of counsel which he has just made, would you not?

A. I would go according to the evidence.

Q. In other words, Mr. Martens, you would take the evidence from the witnesses and you would take the law from [fol. 466] the Court, and not from counsel in the case?

A. Yes.

Q. You would follow his Honor's instructions?

A. Yes.

Q. Whatever he instructed you, that is the thing that would be binding on you?

A. I would hear the evidence, too.

Q. And his Honor's instructions?

A. If his instructions were to my mind I would follow them.

Q. Suppose his Honor's instructions were not with your mind, would you follow his Honor's instructions, if you disagreed with him?

The Court: I think the juror should be advised as to that.

Mr. Dunne: I will accept your Honor's suggestion, and I think this is a fair statement, that there is a difference in function in the trial of a case between the function of the jury and the function of the Court. It is the function of the jury to decide questions of fact, and it is the function of the Court to decide questions of law, and it states the law to the jury in its instructions, and it is the duty of the jury to follow the Court's instructions and not your own idea of what the law should be, even if you think the Court

is wrong, but if you were instructed it was your duty to follow the instructions of the Court would you do that?

A. I would follow the instructions as to the law.

Q. Even if you disagreed with what the law was?

A. Yes.

Q. Can you think of any reason of why you could not be a fair and impartial juror in this case?

A. No.

Mr. Dunne: That is all.

The Court: The next juror.

Mr. Spivock; Mr. Gale, what is your business?

A. Insurance broker.

Q. You said that you owned stock in the Pacific Greyhound Line.

[fol. 467] A. Yes.

Q. That company is connected with the Southern Pacific Company, is it not?

A. I understand so.

Q. Would the fact that you owned stock in any way tend to prejudice you in favor of the Southern Pacific Company?

A. No.

Q. Is there anything you know of why you could not be a fair and impartial juror in this case?

A. No.

Q. Is there any business that you do with the Southern Pacific Company?

A. I have handled insurance of probably three of the company.

Q. Let me ask you this, as I asked the other jurors, I have a serious responsibility here as attorney for the plaintiff in this case, and I would like to ask you if you were in my position would you be satisfied to have twelve men sit on the jury in the same frame of mind as you are?

A. I certainly would.

Q. Are you absolutely satisfied that your business dealings with men with the Southern Pacific Company will not have the slightest effect in influencing your judgment in this case?

A. Yes.

Q. You feel absolutely certain in your own mind that in deciding this case you would do it solely on the evidence and the instructions of the Court, and not be influenced

in any way by any business dealings or acquaintance with anyone of the Southern Pacific Company?

A. Yes.

Q. You are absolutely sure of that?

A. Yes.

Mr. Spivock: I pass the juror.

Mr. Dunne:

Q. Mr. Gale, do you know of any reason why you could not be a perfectly fair juror to both sides?

A. No.

Mr. Dunne: I have no further questions.

The Court: Both sides having passed for cause, the [fol. 468] plaintiff may now exercise the first peremptory challenge.

Mr. Spivock: Plaintiff will excuse Mr. Freese.

The Court: That is Juror No. 5, Mr. Freese is excused. Call another juror.

The Clerk: Bert A. Gayman. (Sworn.)

The Court:

Q. Mr. Gayman, what is your business?

A. Link Belt Company, President.

Q. You are President of it?

A. Yes, Pacific Division.

Mr. Spivock:

Q. Do you have any business dealings with the Southern Pacific Company?

A. As a corporation, we must have.

Q. Are you presently acquainted with any of the officers of that company?

A. Not that I know of.

Q. You have already heard what this case involves, have you not?

A. Yes.

Q. It isas uit by a passenger against the Southern Pacific Company for a large sum of money by reason of a certain injury. Do you feel that your acquaintance and business relations with the Southern Pacific Company would have any effect in biasing or influencing you against the plaintiff?

A. I do not think so.

Q. You feel satisfied in your own mind of that?

A. Yes.

Q. After hearing the evidence and the instructions do you feel that if you brought in a verdict for the plaintiff it would affect in any way your business relations?

A. Absolutely not.

Q. Despite the fact that the verdict might be for a large sum, that would not?

A. That would not enter into it, whatsoever.

Q. Then are you absolutely certain in your own mind if you were in my position, representing the plaintiff, who was very seriously crippled, if you had the responsibility that I have, would you be perfectly satisfied to have twelve [fol. 469] jurors in your present frame of mind sitting in that case?

A. I would be glad to have them.

Mr. Spivock: Pass the juror.

Mr. Dunne: Did I correctly understand the Link Belt Company is a manufacturer of heavy machinery?

A. Yes.

Q. You stated that you did considerable business with the Southern Pacific; I take it you mean you are a shipper over the line?

A. Yes, we ship a great deal; it is a national organization, of which I am president.

Q. Can you think of any reason why you could not be perfectly fair as far as the defendant is concerned?

A. No.

Q. Your company has not had any row with the Southern Pacific Company?

A. It has not had a row with anybody.

Mr. Dunne: That is all.

The Court: The defendant's first peremptory.

Mr. Dunne: We will excuse Mr. Futernick.

The Court: Mr. Futernick is excused. Call another juror.

The Clerk: Edna Adrian. (Sworn.)

The Court: Proceed.

Mr. Spivock:

Q. Mrs. Adrian, what is your business?

A. Housewife.

Q. What does your husband do?
A. Civil engineer.
Q. Working for whom?
A. His own business.
Q. What is the name of his business?
A. Adrian, civil engineer.
Q. As a civil engineer?
A. That is right.
Q. Do you know whether he does any business with or for the Southern Pacific Company?
A. Not that I know of.
Q. Do you know whether he is acquainted with any officials or people working for the Southern Pacific Company?
A. Not that I know of.
[fol. 470] Q. I believe you heard the questions that have been asked here of the other jurors, which I propounded to various jurors, and would your answer be about the same?
A. They would.
Q. You would have no prejudice against the plaintiff by reason of his drinking?
A. No.
Q. If the Court instructed you that the railroad owed a special duty would you follow the Court's instructions?
A. I would follow the Court's instructions.
Q. Do you know of any reason whatever why you could not give a fair trial to either the defendant or the plaintiff in this case?
A. No.

Mr. Spivock: Pass the juror.

Mr. Dunne:

Q. Mrs. Adrian, are you acquainted with any persons whose names have been mentioned in connection with this case?
A. No.
Q. Parties or attorneys?
A. No.
Q. If you were in my position would you be satisfied to have a jury of twelve persons in your present frame of mind?
A. Yes.

The Court: The plaintiff's second [illegible]ptory.
Mr. Spivock: The plaintiff will excuse Mr. Kahn, No. 7.
The Court: Mr. Kahn is excused. Call another juror.
The Clerk: Clarence E. Allan. (Sworn.)

Mr. Spivock:

Q. Mr. Allan, what is your business?
A. Insurance.
Q. A broker, I take it?
A. No, manager of an insurance company.
Q. What company is that?
A. Northern Assurance Company.
Q. Do you have any business dealings with the Southern Pacific Company?
A. We have insurance placed with that company by the brokers.
Q. By the Southern Pacific Company brokers?
A. Yes.
[fol. 471] Q. Do you also handle some insurance for employees and officers of the company?
A. Not that I know of, we may.
Q. As you know in this particular case the Southern Pacific Company is being sued for a great deal of damages; would the fact that your company is doing business with the Southern Pacific Company tend to bias you or influence you in any way for or against the Southern Pacific Company?
A. No, it would not.
Q. Would you have any feeling of fear if you brought in a verdict for plaintiff which was justified under the instructions and the evidence—would you have any fear that that might affect your future business relations with the Southern Pacific Company?
A. Not at all.
Q. Then, let me ask you this, is there any reason at all that you know of why you cannot give a fair and impartial trial to the defendant or the plaintiff?
A. No.
Q. And if there was an accident in which you were personally involved and you were suing the Southern Pacific Company would you be absolutely satisfied to have your case submitted to twelve jurors in your present frame of mind?
A. I would.

Mr. Spivock: Pass the juror.

Mr. Dunne: I have no questions.

The Court: The defendant's second peremptory challenge.

Mr. Dunne: I will excuse Mrs. Adrian.

The Court: Mrs. Adrian is excused. Call a substitute.

The Clerk: Daniel J. Desmond. (Sworn.)

Mr. Spivock:

Q. Mr. Desmond, what is your business?

A. Real estate.

Q. What position do you hold?

A. Vice-president.

Q. Does your company do any business with the Southern Pacific Company?

A. Yes.

[fol. 472] Q. Quite a bit of business?

A. In the neighborhood of $50,000 a year.

Q. You mean you pay that much in freight rates?

A. Yes.

Q. Are you personally acquainted with any officials or employees of the Southern Pacific Company?

A. I am.

The Court: It seems to me where there is a continuous business relationship, even though he is just a shipper, that it is quite a natural thing that the juror, himself, would like to be excused, and I think he ought to be, and I will excuse him.

Call a substitute juror for Mr. Desmond.

The Clerk: Mrs. Norma Walsh. (Sworn.)

Mr. Dunne: If your Honor please, before Mrs. Walsh is called, her husband is a captain in the United States Army, and is here on only a few days leave. If counsel on the other side will consent, we will consent that Mrs. Walsh be excused.

Mr. Spivock: I have no objection if Mrs. Walsh desires to be excused. Do you desire to be excused?

Mrs. Walsh: Yes.

Mr. Spivock: I have no objection.

The Court: You may be excused. Call a substitute juror.

The Clerk: Elliot McAllister. (Sworn.)

Mr. Spivock:

Q. Mr. McAllister, what is your business?

A. With the Bank of California.

Q. What position do you hold there?

A. Vice-president.

Q. Do you have any business dealings with the Southern Pacific Company, or any of its officers?

A. The Southern Pacific Company keeps an account in the bank.

Q. Are you personally acquainted with the officers or agents that come to your bank for the Southern Pacific Company?

A. No, I am not. It does not happen to be an account [fol. 473] that I have anything to do with.

Q. Then are you personally acquainted with any agents or employees at all—are you personally acquainted with any of them?

A. No.

Q. Would the fact that your bank does business with the Southern Pacific Company tend to have the slightest influence or prejudice you in any way to favor the Southern Pacific in this case?

A. No. I would decide the case on the evidence and the Court's instructions.

Q. Would you have the slightest fear in your own mind at this moment that if you brought in a verdict for the plaintiff in any substantial amount that it might hurt the bank in its relations with the Southern Pacific Company?

A. No, not at all. I am a personal friend of Mr. Dunne. I have known him about twenty years.

Q. You are a personal friend of Mr. Dunne?

A. Yes.

Q. Would that circumstance embarrass you at all in performing your duty as a juror?

A. No, I would decide this case on the evidence and the Court's instructions.

The Court: You think you could lay that aside, your acquaintance with Mr. Dunne, and accept the law and the evidence in this case?

A. Yes.

Mr. Spivock: I will challenge the juror for cause. I believe his long acquaintance for twenty-five years is bound to embarrass him.

The Court: You might state a little bit more in detail the nature and extent of your association and friendship with Mr. Dunne.

A. We both entered the University of California along in the '90's.

Q. Were you friends there?

A. Yes, friends there.

Q. You saw a good deal of each other at that time?

A. Yes.

Q. Since that time you have kept up your friendship? [fol. 474] A. Off and on. I have not seen a good deal of Mr. Dunne, we meet at social gatherings.

The Court: Do you have any objection to his being excused?

Mr. Dunne: Your Honor puts me in an embarrassing position, because certainly there has been no cause shown. I will consent to the excuse of the juror so that counsel does not have to use a peremptory challenge, but I think it goes very far from good cause.

The Court: Yes, as in the case of Mr. Desmond, I do not think there is any real basis for cause shown, but I do not like to have on the jury a personal friend of anybody connected with the case. I do not think it is a good idea, irrespective of cause being shown.

Mr. Dunne: I will call to your Honor's attention I was required to use a peremptory challenge to remove a personal friend of Mr. Spivock's.

Mr. Spivock: I call to your attention that counsel did not challenge him for cause.

The Court: He may be excused. Call another juror.

The Clerk: James A. Levensaler. (Sworn.)

Mr. Spivock:

Q. What is your business?

A. General insurance.

Q. Do you do any business for the Southern Pacific?

A. No, not directly.

Q. Which way do you do? When you say "not directly," what do you mean by that?

A. Some of the employees.

Q. Some of the employees of the company?

A. Yes.

Q. You have heard the questions that were propounded this morning; there is no use of my going over them again. Are you familiar with all of those questions?

A. I am.

Q. Is there any reason that you know of why you cannot [fol. 475] give either side a fair and impartial trial?

A. I don't know of any.

Q. Would the fact that you may have done some business with some of the agents of the Southern Pacific Company in any way have the slightest tendency to prejudice you in deciding this case?

A. No.

Q. If you were in the plaintiff's position, seeking damages against the Southern Pacific Company, would you be absolutely satisfied to submit the case to twelve jurors in your present frame of mind?

A. I would.

Q. There is no reason that you know of, then, why you could not serve as a juror here and give a fair and impartial trial?

A. I think not, no.

Q. Nothing that you know of that might influence you one way or the other?

A. I know Mr. McInnes, of the Southern Pacific Company.

Q. Are you personally acquainted with him?

A. Yes.

Q. The fact that you are personally acquainted with Mr. McInnes, who is an important official of the Southern Pacific Company—is he not?

A. Yes.

Q. Would that have the slightest tendency to influence you in deciding this case?

A. None, whatever.

Q. Would you have the slightest fear in your mind at this moment if you brought in a verdict against the Southern Pacific that that would in any way affect your relations with Mr. McInnes?

A. No.

Q. You feel absolutely sure that you would be guided solely by the evidence and the instructions, and not by any outside influence, such as knowing Mr. McInnes, or anyone else?

A. Yes.

Mr. Spivock: Pass the juror.

Mr. Dunne: I have no questions.

The Court: The plaintiff's third peremptory.

[fol. 476] Mr. Spivock: Will your Honor pardon me just a moment, this is the last peremptory that I may take.

The Court: Yes.

Mr. Spivock: The plaintiff will excuse Mr. Allan.

The Court: Mr. Allan will be excused. Call another juror.

The Clerk: Arthur D. Levis. (Sworn.)

Mr. Spivock:

Q. Mr. Levis, what is your business?

A. I am with the Walter Ellis Company.

Q. What sort of business are they in?

A. They handle meal and food stuff.

The Court: What is your capacity?

A. Office manager.

Mr. Spivock:

Q. Does your company have any business with the Southern Pacific Company?

A. Yes, considerable.

Q. How much a year?

A. I could not say off-hand in dollars and cents.

Q. You are continuously engaged in shipping over the Southern Pacific Lines?

A. Practically every day.

Q. Continuously in contact with the agents and employees of the company?

A. Not myself, personally, but our office is.

Q. Your office is, and that is supervised by you?

A. Yes.

Q. Have you any rough idea of the amount of the shipping business per year?

A. $50,000, or more.

Mr. Spivock: His continuous business with the Southern Pacific Company may be embarrassing in this case, and therefore I will challenge for cause.

Mr. Dunne: We will resist the challenge.

The Court: You may be excused.

Mr. Dunne: Note an exception.

The Court: Exception allowed. Call another juror.
The Clerk: Frank C. Kugelberg. (Sworn.)

[fol. 477] Mr. Spivock:

Q. Mr. Kugelberg, what is your business?

A. Importing and exporting.

Q. You are located where—in San Francisco?

A. Yes, 215 Market street.

Q. Do you have any business with the Southern Pacific?

A. A very moderate amount, yes, because some of the freight comes overland.

Q. About how much per year would that business amount to?

A. I would say not to exceed $5000.

Q. A year?

A. A year.

Q. You have heard all of the questions that have been propounded here this morning to the various jurors?

A. I heard practically all of them. However, I was in the rear of the court-room, and at times the voices did not always carry.

Q. Would the fact that your firm is doing $5000 worth of business—first, let me ask you, are you the owner of this business?

A. No, I am not, I am simply a department manager.

Q. Would the fact that your firm is doing $5000 a year business shipping on the Southern Pacific tend to influence you in any way in deciding this case?

A. No, it should not have any effect.

Q. You say it should not?

A. It would not.

Q. Are you absolutely sure that it would not have the slightest effect?

A. Yes, I am sure of that.

Q. Absolutely sure?

A. Yes.

Q. In other words, there is not the slightest fear in your mind that if you brought in a substantial verdict for the plaintiff that it would hurt you in some way in your dealings with the Southern Pacific Company?

A. No, I am sure it would not.

Q. If the evidence and instructions plainly showed that the plaintiff should have a verdict in this case, you would [fol. 478] not hesitate to bring it in?

A. I would not.

Q. The fact that you are doing business with the Southern Pacific Company would not have the slightest effect on your judgment?

A. No, it would not.

Q. You have heard the other questions as to whether or not you would have any prejudice against the plaintiff because he was drinking, he was mentally ill—would that prejudice you in any way against the plaintiff?

A. No, it would not. I would decide the case entirely on the evidence and instructions of the Court.

Q. Is there any reason that you know of, or that you can think of, in your mind at all, why you could not give the plaintiff or the defendant a fair and impartial trial?

A. No, there is not.

Q. Let me ask you, if you were in the position of the plaintiff here, suing the Southern Pacific, would you be absolutely satisfied to have twelve jurors in your present frame of mind decide your case?

A. Yes, I would.

Q. You would be absolutely satisfied?

A. Yes.

Mr. Spivock: Pass the juror for cause.

Mr. Dunne: I have no question.

The Court: The defendant's third peremptory.

Mr. Dunne: The defendant is satisfied.

Juror Gayman: I think I ought to speak up, if I may. The business that we have been doing, shipping, is very large, we are a national concern, and we are a large shipper over the railroad.

The Court:

Q. You are certain it would not make any difference to you?

A. I am certain it would not make any difference.

Mr. Spivock: I will enter the same challenge for cause. [fol. 479] The Court: I do not think that we should have on the jury persons that have business relations, and while I believe that you will be able to lay aside that consideration, I do not think you ought to be put in the position of doing so, and so you are excused.

Call another juror.

The Clerk: Mrs. Mabel Lange. (Sworn.)

Mr. Spivock:

Q. Mrs. Lange, what is your business?
A. Housewife.
Q. What does your husband do?
A. Salesman for the Tonkin Distributing Company.
Q. What kind of business?
A. It is liquor business.

Mr. Spivock: If your Honor please, I might say I am acquainted with the lady's husband, I have spoken with him.

Q. Mr. Lange is sales manager there?
A. Yes.
Q. You have heard the questions propounded to the various jurors here, Mrs. Lange?
A. Yes.
Q. Would your answers be about the same, that you could give the plaintiff and the defendant a fair and impartial trial?
A. Yes.
Q. Does the Tonkin Distributing Company do business with the Southern Pacific?
A. Yes.
Q. In fact, they do a very large business, do they not, over $50,000 a year?
A. I don't know what the amount is, I know it is a large amount.
Q. They are continually shipping and exporting liquors of all kinds?
A. Yes.

The Court: Does the defendant wish the juror excused?
Mr. Dunne: I think, under your Honor's ruling.
The Court: You may be excused. Call a substitute for Mrs. Lange.

[fol. 480] The Clerk: Julian H. Hales. (Sworn.)

Mr. Spivock:

Q. What is your business?
A. I am a rice broker.

The Court:

Q. What kind of a broker?

A. Rice.

Mr. Spivock:

Q. In other words, you handle rice as a commission agent, or something of that kind?

A. Yes, and selling it on a commission.

Q. Do you have much dealings with the Southern Pacific Company?

A. Sometimes of the year, yes.

Q. In what way?

A. Just to ship for customers.

Q. Are you personally acquainted with some of the agents and officials of the company?

A. In the Freight Traffic Department, yes.

Q. Whom do you know there?

A. I know the head of the Freight and Passenger Department.

Q. Do you receive favors from him?

A. No more than would be done for anyone else.

Q. You have heard the questions propounded here. Do you think your acquaintance and your business dealings with the Southern Pacific would have the slightest tendency to bias you at all in the trial of this case?

A. No, I do not see why it should.

Q. Are you absolutely positive?

A. Yes.

Q. The plaintiff is very seriously injured, and it is very important for the plaintiff to have twelve jurors whose minds are free and clear of the slightest prejudice in favor of the Southern Pacific Company. Now, by reason of the responsibility that I have in attempting to select jurors who will be fair, with all that in mind, are you actually positive that there would not be the slightest tendency in your mind, because of your dealings with them, in favor of them?

A. No, I am positive I would not be prejudiced toward [fol. 481] either side.

Q. Is there the slightest fear in your mind if you should render a large verdict for the plaintiff in this case, who was very seriously injured, that that would in any way affect your relations with the Southern Pacific Company?

A. No.

Q. It would not affect your mind a bit in arriving at a decision if you were accepted as a juror?

A. No.

Q. If you were in the plaintiff's position and suing for damages against the Southern Pacific Company, would you be satisfied to have your case heard and decided by twelve jurors in your present frame of mind?

A. Yes, I would.

Mr. Dunne: I have no questions.

The Court: The Clerk will call a substitute juror Freise, Juror No. 9, whom I will excuse.

The Clerk: Carl Wolbach. (Sworn.)

Mr. Spivock:

Q. What is your business?

A. I am a director of Haas Bros.

Q. Does it do a great deal of business with the Southern Pacific Company?

A. Yes.

Q. Over $50,000 a year?

A. Yes.

Mr. Spivock: We raise the challenge.

The Court: You may be excused.

Mr. Dunne: We respectfully note an exception.

The Court: Allowed. Call a substitute juror.

The Clerk: William H. Lutz. (Sworn.)

Mr. Spivock:

Q. Mr. Lutz, what is your business?

A. Retired.

Q. What did you used to do?

A. Steel erector.

Q. Have you had any business dealings with the Southern Pacific Company?

A. No.

[fol. 482] Q. Are you acquainted with any of the officers or employees of the Southern Pacific Company?

A. No, I am not.

Q. Is there any reason you know of why you could not give both the defendant and plaintiff a fair trial in this case?

A. No.

Q. You have heard all of the questions propounded to the jurors?

A. I think I have, most of them.

Q. Would your answers be the same or different?

A. No.

Q. About the same?

A. Yes.

Q. You would have no prejudice against the plaintiff by reason of any previous drinking causing his condition?

A. No.

Q. If the court instructs you regarding the duties of a railroad in accepting a passenger who they know is out of his mind, would you follow those instructions?

A. I would.

Q. If you were in the position of the plaintiff here, seriously injured while a passenger on the railroad, and you were suing the Southern Pacific Company, would you be entirely satisfied to have your case tried by twelve jurors in your frame of mind?

A. Yes.

Q. Is there any reason that you can possibly think of that would affect you so that you could not give an absolutely fair trial?

A. No.

Mr. Spivock: Pass the juror.

Mr. Dunne:

Q. You can be fair to both sides in this case?

A. Yes.

Q. Can you think of any reason why you could not be just as fair to one side as the other?

A. No.

The Court: The defendant may now exercise its third peremptory challenge confined to Mr. Hales, Mr. Lutz, and Mr. Wohlbach.

Mr. Dunne: We respectfully do not care to exercise the third peremptory challenge.

[fols. 483-484] The Court: The plaintiff having exercised all of its available peremptory challenges, and the defendant having accepted the jury, does the plaintiff accept the jury?

Mr. Spivock: Yes, subject to a motion which I will make outside of the presence of the jury.

The Court: Let the jury be sworn.

(Thereupon the jury was sworn.)

Mr. Spivock: If your Honor please, this case may take quite a little while, and I think it would be advisable to have an alternate juror.

The Court: The Court is not advised of any condition that makes it think that it is necessary now. I am going primarily on the opinion that no person in the jury box entertains any feeling of becoming ill. I will ask the jurors. The Court understands your silence to mean you do not know of any serious illness of any sort, so the Court will not impanel an alternate juror.

* * * * * * *

[fol. 485] Afternoon Session, Tuesday, November 24, 1942 —2 P. M.

The Court: You may proceed.

CHALLENGE TO JURORS

Mr. Spivock: If your Honor please, for the sake of the record, at least, plaintiff at this time would like to enter a challenge to the twelve jurors chosen to try this case; and the challenge is made for cause, first, on all the grounds which have been set forth in plaintiff's previous motion to strike out the entire jury panel, which grounds and which motion are hereby referred to by plaintiff and made a part of this motion; and also upon the further ground that by actual experience in the selection of these twelve jurors it now appears that there are on the jury which has been selected to try this case at least six jurors who are closely affiliated and connected with the Southern Pacific Company, the defendant in this case, as follows:

Mr. Gale, juror No. 12, owns stock in the Pacific Greyhound Company, which he knows to be a subsidiary of the Southern Pacific Company.

Mrs. Goeppner's husband is a florist who does considerable business with the Southern Pacific Company, and Mr. Dunne, opposing counsel, has a charge account at her husband's place of business. I might state Mrs. Goeppner is Juror No. 4.

Mr. Hohweisner, Juror No. 8, an insurance broker, plays golf and is very intimate socially with many of the officials and officers of the Southern Pacific Company.

Mr. Levensaler knows the head ticket agent and a very high official of the defendant Southern Pacific Company. Mr. Levensaler is Juror No. 3.

Mr. Knight is an important executive, sales manager, of [fol. 486] the Bancroft Whitney Company, a law book firm that sells over fifty thousand dollars——

The Court: I think someone has already challenged him.

Mr. Spivock: No, Mr. Knight——

The Court: He is a salesman for a stationery business—Mr. Knight.

Mr. Spivock: Pardon me, then.

The Court: I think the gentleman you are thinking about from the law book company, Mr. Freese, has already been challenged, and has been excused from the jury.

Mr. Dunne: That is correct.

Mr. Spivock: Oh, yes, there is a slight confusion; your Honor is correct. Mr. Knight—I have a notation here that his firm does business with the Southern Pacific Company. In other words, he is an executive of some type. In the short time, as your Honor realizes, I haven't got this sufficiently prepared. But he is an important officer or agent, to put it mildly, of Schwabacher-Frey Company, a very large corporation in San Francisco, here, which does a considerable business with the Southern Pacific Company.

The Court: I understood he occupied the high position of salesman in that concern.

Mr. Spivock: It isn't absolutely clear to me whether it was sales manager, or ordinary salesman; I am not absolutely certain. Mr. Knight was Juror No. 6.

And then Mr. Bright, Juror No. 10, although he is a retired postal clerk, he has ridden on many Southern Pacific trains, and is well acquainted with Mr. Goldsmith, of the Traffic Department of the Southern Pacific Company.

I cite this for the reason that, under the decision in Knox [fol. 487] v. Alabama, the United States Supreme Court has said that although the selection of a jury may appear fair and impartial on its face, if in truth and in fact the effect of that method used to select the jury is such that either one party or the other is deprived of his constitutional right to a fair jury trial, then there has been discrimination against the rights of the plaintiff in this particular case.

I point out to your Honor, aside from the fact that there are six on the jury now, that there were at least four, or five, or six or more that were actually excused by your Honor even because of their close connections and associations in business with the Southern Pacific. So I believe there has been a very powerful showing here on the evidence given alone that the method used in selecting the jury is such, that is, the executives and the business people that are selected and the manner which is used to select primarily business people out of such a large city as San Francisco, where there are hundreds of thousands of jurors that could be selected that have no particular affiliation or association with the Southern Pacific Company—the selection has been almost entirely of the business and executive type that is bound to have business with the Southern Pacific Company. And it has been proven by actual experience and test here this morning to such an extent that plaintiff is now in the predicament of being forced to go to trial before a jury which he even endeavored to have stricken out in this case, but is here now only because the defendant refused to consent to that—the plaintiff is in the predicament now of being forced to trial before a jury where he knows in advance, after he has exercised every challenge which the law allows him, of three, that there are at least six people [fol. 488] on there that should not ordinarily be on there if there was a fair and impartial selection of jurors to begin with. In other words, when you start off to begin with the wrong system, it is almost axiomatic that the final result is bound to be wrong. And, as I stated before, from the great number of jurors which appeared here to-day, doing big business and small business, and having acquaintanceship with the executives and officials of the Southern Pacific, I believe it is apparent that in substance and effect the method of selection used here is decidedly unfair as far as the plaintiff is concerned, as far as his right to a fair and impartial jury trial is concerned.

The Court: If it was said in the record it both escaped my attention and I did not hear it; it may be that the record shows that the Greyhound Lines, in which Mr. Gale said he owned some stock——

Mr. Spivock: Yes.

The Court: I remember he said something about owning some stock in the Greyhound; but if he said that that con-

cern was owned in part by the defendant railway company, or if the railway company owned some interest in the Greyhound, that escaped my attention.

Mr. Spivock: No; I am confused——

The Court: Why didn't you bring that to my attention before the remainder of the jury panel was excused?

Mr. Spivock: It slipped my attention for the moment, if your Honor please, because I was trying my hardest to get off the people that were more closely connected with the Southern Pacific Company. The Pacific Greyhound is a subsidiary owned and controlled by the Southern Pacific. I know they own the majority stock, and the juror was [fol. 489] stating he understood they did not. It was a little bit remote, and I felt your Honor would not allow a challenge for cause, being somewhat remote. I got to the point we were excusing so many that I did not know just where we were going to stop here this morning; we were just excusing them one after another, and, as I said, when I got through I still had six I would like to exercise peremptory challenges because I was brought to an automatic stop, and they might argue that challenges for cause as to any bias——

The Court: I would like to be advised as to the relationship between the Greyhound Company and the defendant company. I did not know there was any relationship.

Mr. Spivock: Mr. Dunne can correct me. I am positive the juror stated it is a subsidiary.

Mr. Dunne: Your Honor, I have no recollection of any such statement in the record. The second thing is, your Honor wants to know if there is any relationship.

The Court: If there is in fact any interlocking stock or interlocking directorate.

Mr. Dunne: Now, so far as interlocking directorate is concerned—and your Honor must understand I am speaking now from general understanding and could be mistaken, but my understanding is that there is no interlocking directorship relationship as between the two companies. If there were, it would have to be one to be passed on by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act and the Clayton act.

As to stock interest, it is my understanding that there is some stock interest; that the Southern Pacific Company owns a minority stock interest in the Pacific Greyhound

Company. How much that is and just what the relation [fol. 490] between the two corporations is I am not prepared to say; but it is my information that Southern Pacific Company is a stockholder of Pacific Greyhound, and a minority stockholder.

Mr. Spivock: I believe that is an understatement. It is common knowledge, I think, of anyone, that the Pacific Greyhound and the Southern Pacific are very closely connected.

Mr. Dunne: It isn't common knowledge.

Mr. Spivock: I have known it for years.

Mr. Dunne: Counsel knows a great many things that do not appear on the record; and while I have the opportunity, I want to say that counsel, here has made a number of misstatements as to what occurred during the impanelment of the jury, and what the jurors said. As to those, I don't want to argue the matter; I simply don't want by my silence to have it understood that I am acceding to any of those statements.

The Court: Do you wish to make any response to this matter, at all, and particularly with reference to Juror Gale, who said he owned some stock in a company that both of you admit is owned in part—or in respect to which the defendant company has a minority stock interest?

Mr. Dunne: I have a number of things to say about that. First, Mr. Gale answered truthfully the questions that were put to him, which was all that was required of him; secondly, there was no challenge for cause; thirdly, there was no attempt to exercise a peremptory challenge as to Mr. Gale, or no attempt to exercise more than the three peremptory challenges. In the fourth place, the jury has been exhausted, has been accepted; and in the fifth place, counsel, upon his own statement to your Honor, says that he has known what he claims to be the fact as to the relationship between the Greyhound Company and the Southern [fol. 491] Pacific Company for a good many years; and lastly, it is not a ground for challenge for cause. Your Honor was very liberal this morning with counsel upon both sides in excusing jurors when there was no ground for challenge for cause, where there was no relationship of debtor and creditor, where people were only employees of corporations who had normal business with carriers.

I notice that counsel was very careful not to ask the man who worked in the shipyard whether his shipyard did

any business with the Southern Pacific Company. I think your Honor could take judicial notice that all shipyards are receiving freight over the lines of the Southern Pacific Company. I am suggesting those things because I think counsel has assumed an unfair attitude, after the great liberality your Honor showed this morning.

The Court: The thing that is most important here to the Court is that this matter as to the Juror Gale has been allowed to reach this stage after the Court had already excused the remaining panel and would have no jurors present from whom to select; and if counsel had advised the Court or called this particular objection to the attention of the Court, before the other jurors were excused, the Court then could have had an opportunity to consider, in the light of that situation, what might be done about it. But, as I recall, when I asked counsel for the plaintiff if he accepted the jury, he said he accepted the jury subject to this motion which he hoped later to make.

Mr. Dunne: That is right, your Honor.

The Court: And at that time he did not advise the court that he had any specific objection for cause against this juror.

Mr. Spivock: It was an oversight on my part, evidently, [fol. 492] and then, again, I had exhausted my three, so it just slipped my mind. I just couldn't go any further, anyway. That was the situation; I felt that I had to take what was left; I just couldn't——

The Court: Do you have in mind any authority, Mr. Spivock, to show to the Court that it is a basis of a challenge for cause, this fact that Mr. Gale owns stock in the Greyhound and that part of the Greyhound stock is owned by the Southern Pacific; in other words, that the juror and the defendant are evidently stockholders of the same concern?

Mr. Spivock: I have no authority, but I am quite sure there would be something along that line.

Mr. Dunne: If your Honor please, of course, that would be upon the ground of mutual financial interest.

The Court: Yes.

Mr. Dunne: The ground of mutual financial interest in this State, under the statute, is a ground for disqualification of a judge. That precise matter I had before the Supreme Court of this State in the case of Central Pacific

Railroad Company v. The Superior Court. The situation was this: An action was brought by the Central Pacific Railroad Company to condemn land for the purpose of smoothing some curves in the Siskiyou Mountains, as the trains come over down into the Sacramento Valley, for the purpose of permitting the use of heavier equipment and speeding up the traffic. The case was tried before Judge Luttrell in Siskiyou County. It developed that a part of this land was subject to mortgage to the Bank of Italy, a banking corporation. It also developed that Judge Luttrell was a depositor with the Bank of Italy. In addition to that, the Bank of Italy was an operating banking corporation; its stock was wholly owned—not a question [fol. 493] of a minority interest, but its stock was wholly owned by a corporation known at that time as Bank of America, or Bancamerica Corporation. Judge Luttrell was a stockholder of that parent corporation. The Supreme Court of this State held that he was not disqualified. I call that to your Honor's attention, because it occurs to me immediately, and it was a question of stock ownership where our California statute, in respect to the qualification of judges, had a definite provision in respect of stock ownership. That was too remote. It was held that it was not ground for disqualification. And I think that if counsel will look at the statute he will find——

The Court: Do you claim that Greyhound profits by the operation of the Southern Pacific Company, the defendant in this case?

Mr. Spivock: I don't believe so. My general knowledge would be that the Pacific Greyhound is a subsidiary, and unless I am very badly mistaken that is exactly what Mr. Gale said.

The Court: The reverse would be true, would it not, that you would suppose that the Southern Pacific Company would hope to profit by the operation of the Greyhound Lines; is that not probable?

Mr. Spivock: It would seem that that is probable. However——

The Court: But you wouldn't, would you, expect the Greyhound Lines to profit by the operation of the Southern Pacific Company?

Mr. Spivock: Probably not, except——

The Court: Then if that is a proper analysis of the situation, a stockholder in the Greyhound Lines could not hope to profit or lose by virtue of a jury's verdict in this case against the Southern Pacific; is that not the case?

Mr. Spivock: That is probably true, and it is possible [fols. 494-987] that that was what was going through my mind when I did not immediately exercise the peremptory, your Honor, against Mr. Gale.

ORDER DENYING CHALLENGE TO JURORS

The Court: There not having been any challenge for cause of any juror that is here sworn to try this case, and all of the peremptory challenges having been exercised by the plaintiff, and considering the juncture at which we have now arrived, particularly the circumstance that all of the jury panel remaining other than those sworn to try the case have been excused; and considering also the merits of this motion and believing as I firmly do, that as a matter of fact, the plaintiff has a fair jury to try his case—I have listened very carefully to the interrogation of jurors by counsel on both sides; the Court interposed some questions directed to the jurors; and the Court has considered the business and social connections of the jurors with a view to testing as to whether they might be considered fair to both sides in this litigation—and after giving this consideration, and hearing these questions asked, and hearing the answers given by the jurors, the Court is firmly convinced that this jury is in fact a fair jury, and the motion is denied.

[fol. 988] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10,681

GILBERT E. THIEL, Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Appellee

Appeal from the District Court of the United States for the Northern District of California, Southern Division

OPINION—Filed May 15, 1945

Before Mathews, Stephens and Healy, Circuit Judges

MATHEWS, Circuit Judge:

Appellee, Southern Pacific Company, a Kentucky corporation, was at all pertinent times a common carrier engaged in the business of operating railroads and railroad trains and transporting freight and passengers for hire. Two places between which appellee operated trains and transported passengers were Reno, Nevada, and San Francisco, California. One of the trains operated by appellee between Reno and San Francisco was train No. 9.

On February 25, 1940, appellant, Gilbert E. Thiel, a citizen of California, was a passenger on appellee's train No. 9, having boarded it at Reno to go to San Francisco. Appellant seated himself by a window in one of the day coaches—the one called the smoker. The train left Reno at 8:50 P.M. Twenty-five minutes later, at a point in Nevada between Verdi, Nevada, and Truckee, California, while the train was traveling at a speed of about 35 miles an hour, appellant opened the window, leaped out, fell to the ground and was injured.

The train was stopped and was backed to the place where appellant had fallen. Appellant was put on a stretcher and put aboard the train—in the baggage car. [fol. 989 ]The train then proceeded to Truckee. There appellant was removed from the train and was treated by appellee's district surgeon, Dr. J. H. Bernard, after which, on February 25, 1940, he was taken in an ambulance to a hospital in Reno, where he remained under treatment for several months.

On December 30, 1940, appellant brought an action against appellee for damages in the sum of $250,000 for the injuries resulting from his leap from the train. The complaint, in substance and effect, alleged that appellant was "out of his normal mind" on February 25, 1940; that before accepting appellant as a passenger, appellee was informed that he was "out of his normal mind" and therefore should not be accepted as a passenger or else should be guarded; that appellee nevertheless accepted appellant as a passenger, left him unguarded and, when he leaped, failed to stop the train before he fell to the ground; and that appellee's said conduct constituted negligence and caused appellant's injuries.

The action was brought in the Superior Court of the State of California in and for the City and County of San Francisco, but, on petition of appellee, was removed from that court to the District Court of the United States for the Northern District of California. There, on February 24, 1941, appellee answered. The answer, in substance and effect, denied that appellant was "out of his normal mind" on February 25, 1940; denied that appellee was informed that appellant was "out of his normal mind" and therefore should not be accepted as a passenger or else should be guarded; denied that appellee was guilty of any negligence; alleged that appellant's injuries were caused by his own negligence; and, as a separate defense, alleged that his injuries were contributed to by his own negligence.

On March 5, 1941, appellant filed in the District Court a written demand for a jury trial. Two months later he moved the District Court to remand the action to the Superior Court. The motion was denied. Thereafter, disregarding the removal and the refusal to remand, appellant attempted to prosecute the action in the Superior Court. Appellee thereupon applied for and, after a hearing, obtained from the District Court a judgment enjoining such prosecution. That judgment was affirmed by us [fol. 990] on March 20, 1942.[1] Certiorari to review our decision was denied on June 1, 1942.[2]

On October 12, 1942, the action was assigned for trial on November 24, 1942. Prior to November 5, 1942, a

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[1] 126 F. 2d 710.

[2] 316 U. S. 698.

panel of prospective jurors was drawn—the panel from which a trial jury was to be and was thereafter empaneled. On November 5, 1942, appellant challenged the array—the panel of prospective jurors drawn as aforesaid.[3] The challenge was overruled.

On November 19, 1942, appellant amended his complaint by adding thereto paragraph VIIa, which, in substance and effect, alleged that appellee was negligent in failing to give appellant first aid treatment before taking him to Truckee and in failing to give him proper medical attention at Truckee, and that said negligence aggravated appellant's injuries. These allegations were denied by appellee.

On November 21, 1942, appellant moved the court to strike his demand for a jury trial. The motion was denied. Trial of the action was commenced on November 24, 1942. After a jury was empaneled and sworn, appellant challenged the twelve jurors comprising it.[4] The challenge was overruled and the trial proceeded. At the close of all the evidence, appellant moved the court for a directed verdict in his favor. The motion was denied. The jury returned a verdict for appellee. Appellant moved for a new trial and, in connection therewith, moved for leave to take depositions. Both motions were denied, and judgment was entered for appellee. From that judgment this appeal is prosecuted.

Appellant specifies as error the overruling of his challenge to the array—the panel of prospective jurors drawn as aforesaid. The challenge was based on eight stated grounds. Ground 1 was that the judges of the District Court "failed to prescribe any rules of qualifications or otherwise for the selection of said jury panel." The judges were not required to prescribe such rules.

Ground 2 was that "mostly business executives or those having the employer's viewpoint [were] purposely selected [fol. 991] on said panel." Actually, no one was "selected on said panel," purposely or otherwise. The panel was

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[3] Appellant called this challenge a motion to strike out the panel.

[4] Appellant called this challenge a motion to strike out the twelve jurors.

not selected, but was drawn, as required by § 276 of the Judicial Code, 28 U. S. C. A. § 412, from a box containing the names of not less than 300 persons possessing the qualifications prescribed in § 275 of the Judicial Code, 28 U. S. C. A. § 411, which names had been placed in the box by the clerk of the District Court, or a duly qualified deputy clerk, and a duly appointed jury commissioner. There was no evidence that the persons whose names were in the box, or the persons whose names were drawn therefrom and who thus became members of the panel, were "mostly business executives or those having the employer's viewpoint."

Ground 3 was that "a larger proportion of men jurors [were] purposely selected, thus discriminating against women jurors." Actually, neither men nor women were selected as members of the panel; for, as said before, the panel was not selected, but was drawn from a box containing the names of not less than 300 persons. There was no evidence that women were discriminated against in placing names in the box or in drawing names therefrom. Many of the persons whose names were in the box, and many of the persons whose names were drawn therefrom and who thus became members of the panel, were women. The fact, if it be a fact, that a majority were men is immaterial.

Ground 4 was that "no examination whatever [was] made of said jurors before they [were] put on said panel to ascertain their qualifications or particularly their unfitness by reason of business or other connections with or prejudice in favor of such gigantic corporations as [appellee]." No such examination was required.

Ground 5[5] was that the judges of the District Court "failed to provide the necessary facilities or funds to permit proper investigation of prospective jurors." The judges were not required to provide such facilities or funds.

Ground 6 was that "no effort [was] made to proportionately or fairly represent citizens of all races on said

[5] In appellant's challenge to the array, grounds 4 and 5 were numbered 4, and grounds 6, 7 and 8 were numbered 5, 6 and 7.

panel, thus systematically excluding Negroes and Chinese." [fol. 992] Proportional representation of "citizens of all race on said panel" was not required. The box from which the panel was drawn contained the names of citizens of the Negro race and of the Chinese race. Citizens of these races were not excluded, systematically or otherwise.

Ground 7 was that "no effort [was] made to apportion jurors by districts when selecting them." No such apportionment was required.

Ground 8 was that appellee had "been able to prevail in every personal injury action against it, tried by a jury in [the District] Court," in the nine years next preceding the date of the challenge to the array. This, if true, is immaterial.

The challenge to the array was properly overruled.

Appellant specifies as error the denial of his motion to strike his demand for a jury trial. The motion was, in effect, an attempt to withdraw the demand, which appellant could not do without appellee's consent.[6] Appellee did not consent to, but opposed, the attempted withdrawal. The motion was properly denied.

Appellant specifies as error the overruling of his challenge to the twelve trial jurors—a challenge interposed after the jury was empaneled and sworn. This challenge was based on the eight stated grounds hereinabove discussed and shown to be untenable, and on the further ground that six of the jurors[7] were "closely affiliated and connected with" appellee. There was no evidence that any of the six jurors was so affiliated or connected. This challenge was properly overruled.

Appellant specifies as error the admission of appellee's Exhibit A-5 in evidence. Exhibit A-5 was a part of a certified copy of the complaint in an action brought by appellant's wife, Billie Belle Brown Thiel, against appellant on October 9, 1940, in the Superior Court of the State of California in and for the City and County of San Fran- [fol. 993] cisco—the part showing paragraph VII of the

[6] See Rule 38(d) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following § 723c.

[7] James A. Levensaler, Phyllis B. Goeppner, Frederick W. Knight, Frederick M. Holweisner, Herbert N. Bright and Maurice A. Cale.

complaint.[8] Paragraph VII alleged that appellant "attempted to commit suicide and jumped from the window of a moving train,[9] resulting in injury to [appellant]." Though duly served with process, appellant failed to answer, and his wife took judgment against him by default. In view of his default—his failure to answer, much less deny, the allegations of his wife's complaint—we think that paragraph VII thereof (Exhibit A-5) was admissible in evidence.[10]

Appellant specifies as error the alleged denial of his alleged "right to explain the full circumstances of said default, including his attempt to have his wife's attorney remove the false allegation about his attempted suicide." No such explanation was offered.

Appellant specifies as error the denial of his motion for a directed verdict. The denial was proper for the following reasons:

There was evidence tending to show that appellant was "out of his normal mind" on February 25, 1940, as alleged in his complaint, and there was evidence tending to show the contrary. There was evidence tending to show that, before accepting appellant as a passenger, appellee was informed that he was "out of his normal mind" and therefore should not be accepted as a passenger or else should be guarded, and there was evidence tending to show the contrary. These conflicts were for the jury, not the court, to resolve.

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[8] The certified copy mentioned above—a copy of the entire complaint—was exhibited to the court and to appellant's counsel, but only paragraph VII thereof was offered in evidence. However, in offering paragraph VII, appellee indicated its willingness to have the entire document put in evidence if appellant's counsel so desired. Appellant's counsel thereupon indicated that he had no such desire. Accordingly, other portions of the document were not put in evidence and are not before us.

[9] Meaning appellee's train No. 9, from which appellant leaped on February 25, 1940.

[10] Estate of McCarthy, 127 Cal. App. 80, 15 P. 2d 223; Bonazzi v. Fortney, 94 Vt. 263, 110 Atl. 439; 1 Greenleaf on Evidence, 16th Ed., § 527(a); 4 Wigmore on Evidence, 3d Ed., §§ 1066, 1072 (pp. 60, 79).

The evidence showed that appellee accepted appellant as a passenger and left him unguarded. Whether or not [fol. 994] this conduct of appellee constituted negligence was a question for the jury. We cannot say that it constituted negligence as a matter of law.

The evidence showed that, as appellant leaped through the train window, a fellow passenger (John A. Morris) and one or two others tried to stop him. They were able to, and did, take hold of his coat and held him, dangling outside the window, for an estimated period of a minute and a half, but despite their efforts, he slipped from his coat and fell to the ground. A brakeman (William A. Sherman), seeing appellant leap through the window, signaled the engineer to stop the train. The engineer did so. Appellant, however, fell to the ground before the train was stopped. As to whether the train could have been stopped before appellant fell, the evidence was conflicting. This conflict was for the jury, not the court, to resolve.

The evidence showed that appellee did not give appellant any first aid treatment before taking him to Truckee. Whether or not the failure to do so constituted negligence was a question for the jury. We cannot say that it constituted negligence as a matter of law.

The evidence did not show that appellee failed to give appellant proper medical attention at Truckee. Instead, the evidence showed there was no such failure.

Appellant specifies as error the giving of certain instructions to the jury. In the trial court, appellant did not state the grounds, if any, of his objection to the instructions. Therefore the giving of the instructions was not assignable as error.[11]

Appellant specifies as error the denial of his motion for a new trial and the denial of his motion to take depositions in support of his motion for a new trial. These motions were addressed to the trial court's discretion, the exercise of which, in the absence of abuse, is not reviewable. No abuse is shown.

Judgment affirmed.

[File endorsement omitted.]

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[11] See Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following § 723c.

[fol. 995] In United States Circuit Court of Appeals for the Ninth Circuit

No. 10681

Gilbert E. Thiel, Appellant,

vs.

Southern Pacific Company, a Corporation, Appellee

Judgment—Filed May 15, 1945

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this Court that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

[File endorsement omitted.]

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[fol. 996] In United States Circuit Court of Appeals for the Ninth Circuit

Before Mathews, Stephens and Healy, Circuit Judges

Order Denying Petition for Rehearing—June 8, 1945

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed June 7, 1945, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[fol. 997] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10681

GILBERT E. THIEL, Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Appellee.

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing nine hundred and ninety-six (996) pages, numbered from and including 1 to and including 996, to be a full, true and correct copy of the entire record of the above entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States as the original thereof remains on file and appears of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this sixth day of August, 1945.

Paul P. O'Brien, Clerk. (Seal.)

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[fol. 998] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED *In Forma Pauperis*—Filed January 14, 1946

On Consideration of the motion for leave to proceed *in forma pauperis* herein,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson took no part in the consideration of this motion.

[fol. 999] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to the question whether petitioner's motion to strike the jury panel was properly denied.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

[Endorsed on cover:] In forma pauperis. Enter Gilbert E. Thiel, pro se. File No. 50052. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 349. Gilbert E. Thiel, Petitioner, vs. Southern Pacific Company. Petition for writ of certiorari and exhibit thereto. Filed August 20, 1945. Term No. 349 O. T. 1945.

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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# No. 349

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GILBERT E. THIEL,

*Petitioner,*

*vs.*

SOUTHERN PACIFIC CO., A CORPORATION,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

---

ALLEN SPIVOCK,
*Counsel for Petitioner.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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# No. 349

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GILBERT E. THIEL,

*Petitioner,*

*vs.*

SOUTHERN PACIFIC CO., A CORPORATION,

*Respondent*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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*To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:*

The petition of said Gilbert E. Thiel for a review on writ of certiorari of the decision of the United States Circuit Court of Appeals for the Ninth Circuit respectfully shows:

### Statement of Matter Involved

Stated as briefly as possible, on December 30, 1940, plaintiff and appellant Gilbert E. Thiel, petitioner herein, aged

28, filed a complaint in the State Superior Court of California for $250,000.00 damages for loss of both legs and the use of one arm sustained while a passenger on a train of the defendant Southern Pacific Co., a corporation, respondent herein. Said complaint also named several "Doe" defendants (R. 3-5). Said defendant Company promptly removed the case to the Federal District Court at San Francisco, California, because it was a Kentucky corporation. Plaintiff opposed the removal but was unable to prevent same as he did not have the names or addresses of said "Does." However, when the answers to plaintiff's interrogatories in said Federal Court revealed this information and there was then no diversity of citizenship because of the California residence of one of them, plaintiff promptly moved to amend his complaint and to remand the case to the State Court.

Obtaining remand to the State Court became *extremely vital* to plaintiff when his attorney received positive and definite information from many attorneys whose cases had recently been similarly transferred to said Federal Court that it was *impossible* to win a jury case against said defendant Southern Pacific Co. in said Federal Court, because they had found the jurors were all "hand picked" instead of being selected by lot and "peculiarly" they were nearly all connected with said defendant Company by business, social or other ties and thus subject to influence by said defendant Company (R. 13-14).

Plaintiff's two motions to obtain remand which seemed to be clearly in order were vigorously opposed by said defendant Company and were denied and plaintiff was restrained from proceeding further in the State Court. Plaintiff appealed to the Circuit Court of Appeals but was denied any relief or even any consideration of the points specifically raised by him, and finally, in desperation, plain-

tiff even applied for certiorari to this Supreme Court on the technical question of the legal procedure to remand but was denied a hearing. *126 F. (2) 110; 346 U. S. 698* (1942). Thus, plaintiff was left with no choice but to proceed with his suit in the Federal Court.

Briefly, the complaint made *three* main charges of negligence. *Firstly,* it alleged that on February 25, 1940, at Reno, Nevada, plaintiff was accepted as a passenger for an all night ride to San Francisco by defendant Southern Pacific Co. whose agents were specifically "*informed,*" before the train started, "that plaintiff was not then in his normal mind by reason of excessive and continued drinking of alcoholic liquors and that plaintiff should not be taken as a passenger or else should be guarded on his said proposed trip to San Francisco as plaintiff was in a highly depressed mental state over his marriage of a week before in said Reno and he might do something rash;" that defendant's "special police officer remained with plaintiff for some time but then" carelessly "left him alone and unguarded" (R. 4).

*Secondly,* it was alleged that while the train was in motion and while plaintiff was in said abnormal condition, he suddenly opened a train window and started to get out and then hung onto the window sill "for some time until he fell to the ground" but defendant's "conductor" who observed all this "carelessly failed to give the stop signal until *after* plaintiff had fallen to the ground" (R. 4).

*Thirdly,* it was alleged "That upon falling from said train, both of plaintiff's feet were cut off at the ankles" but he was given no first-aid whatever (R. 6-9). Defendant Company later *admitted* that his ankles were left bleeding for one hour until he was brought to Truckee.

It was further alleged that there he received careless attention so that gas bacillus infection developed requiring amputation of both of plaintiff's legs (R. 69).

Defendant's answer denied negligence on any of said three main charges but admitted it was "informed" of plaintiff's condition before the train started and admitted "it was a *fact* that he had been so drinking" (R. 5-6). Defendant also admitted that "plaintiff was in an abnormal psychological and mental state" (R. 7).

Immediately after this case was transferred by defendant Company to the Federal Court, plaintiff filed his demand for a jury trial. When the Appellate Courts denied plaintiff any relief so that he might proceed in the State Court, the case was set for trial in the Federal Court on November 24, 1942.

Plaintiff had been employed mainly as a mechanic. On November 5, 1942, plaintiff filed a motion to strike out the entire jury panel (R. 9) and also filed an affidavit by his counsel (R. 11), showing that the Clerk and Jury Commissioner who select the trial jurors plainly stated to affiant that they were guided by no rules from the Court but *deliberately* and *purposely* selected mostly men instead of women and these men were mostly business executives or employed by large corporations; that the result is that said jurors obviously have the employer's viewpoint and are not sympathetic to a mere wage earner such as plaintiff here. Said affidavit further pointed out that the "*effect*" of said "system" was that said defendant Southern Pacific Co. has prevailed in every personal injury and death action for the past nine years; that said defendant has made it a regular practice to use every effort to remove all such cases from the State to the Federal Court; that five of the attorneys for the plaintiffs in cases tried most recently informed affiant that the jurors were

nearly all business executives and business men and it was apparent that they were connected with or in some way subject to influence by said defendant Company so that the plaintiffs did not receive a fair verdict, whereas they would have prevailed in the State Court (R. 13-14).

On November 9, 1942, at the hearing of said motion (R. 15), the Clerk testified that he has been such for 30 years last past; that as part of his duties, he selects one-half of the names for trial jurors for the Federal District Court, the other half being selected by the Jury Commissioner who has served for the past three years; that his method "generally speaking, is to take the City Directory and select the names of people who I think, *from their occupation and residence*, would be *intelligent* people to act as jurors in this Court" (R. 28); that he does not select anyone listed as a "longshoreman" or anyone working for a daily wage because he believes they would not want to serve (R. 29-31); that the number of men selected "who might be mechanics, janitors or of the labor class" "would be a small percentage" (R. 32); that the "*majority* would be business people and "their wives" (R. 36) and "*their* employees" (R. 37); that *at* LEAST 50% " "had responsible positions and had pretty *substantial salaries*" (R. 37); that no selection rules are prescribed by the Judges (R. 32); that no effort is made to equalize men and women as jurors (R. 32) or to apportion the jurors by districts (R. 34); that the above procedure "applies to the jury list" in this case (R. 35).

The Jury Commissioner testified that "*at* LEAST 50%" of those he selects are "CONNECTED WITH some BIG BUSINESS concern" (R. 46); that he omits *all* "carpenters"; that he "EXCLUDES, PURPOSELY" "ALL the iron craft, bricklayers, carpenters, and machinists" (R. 47); that he has "EXCLUDED" "ALL of those groups from the jury list" (R. 47); that he has no recollection of ever selecting a "laborer" (R.

48); that "his duty was merely to select a CROSS SECTION of the people in San Francisco who might be impartial and fair jurors" (R. 48), but he made *no* effort to get a "CROSS SECTION of the people of San Francisco with regard to wealth" (R. 51); that he has "PURPOSELY put on *more* men than women" (R. 48); that he makes no effort to apportion by districts (R. 49); that he has no rules to guide him and does not follow or even know the applicable California Code sections (R. 49); that the above method of selection was used for this case (R. 51); that "*at* LEAST 50%" of the names selected are from the "BUSINESS DISTRICT of San Francisco" (R. 51).

Two attorneys with considerable jury trial experience bluntly testified that they had won verdicts against defendant Southern Pacific Co. in the State Courts but found it impossible to win in the Federal Court because the jurors are all connected with big business concerns and are all biased in favor of the Southern Pacific Co. (R. 16-22; 23-26) They further testified that in the City and County of San Francisco "about three-quarters of the population were either working people or members of their family" (R. 22) and in Alameda County "with their families they constitute fully 85% of the population of some 300,000" (R. 26).

Judge John C. Bowen denied the motion (R. 68) with the frank remark that since a somewhat similar motion had been denied here some months before in a *criminal* case (R. 40), it was not for him who was merely an outside judge from Seattle, Washington, to come to San Francisco and change the jury system which was being followed for so many years.

On November 21, 1942, at the pre-trial conference, being sincerely convinced that the jury would be controlled by "friends" of the defendant S. P. Co., plaintiff felt compelled to waive a jury trial and place his faith in the new Judge

from Seattle but the defendant Company refused to agree and stoutly insisted upon a jury trial which the Court ordered (R. 70).

The trial started on November 24, 1942. There were 24 prospective jurors who were actually examined. Of these, the Court excused a total of 7 because 6 of them were business executives having very large and continuous business dealings and connections with the defendant Southern Pacific Co. (R. 113-122), and it excused 1 vice-president of a bank with a Southern Pacific Co. account but mainly because he was a fraternity brother of defendant's counsel (R. 115). Plaintiff exercised his full limit of 3 peremptory challenges against those doing business with officials or employees of the S. P. Co. (R. 109, 98, 111, 99, 117, 111), but defendant was content to use only 2, one against an alleged friend of plaintiff's counsel (R. 110), and the other against a woman who said that neither she nor her husband knew anyone in the S. P. Co. (R. 110-113). This left twelve jurors in the box.

Upon inquiry by the Court, plaintiff said the jury would be accepted "subject to a motion which I will make outside of the presence of the jury" (R. 124). The Court recessed for lunch. Then plaintiff moved to strike out all twelve jurors in the box and entered a "challenge" "for *cause*" against all of them stating that "by actual experience" it then appeared that there were on the jury "at *least* six jurors who are closely affiliated and connected with the Southern Pacific Company" as follows (R. 124-125):

> "Mr. Gale, Juror No. 12, owns stock in the Pacific Greyhound Company, which he knows to be a subsidiary of the Southern Pacific Company.
>
> "Mrs. Goeppner's husband is a florist who does considerable business with the Southern Pacific Company, and Mr. Dunne, opposing counsel, has a charge ac-

count at her husband's place of business. I might state Mrs. Goeppner is Juror No. 4.

"Mr. Hohweisner, Juror No. 8, an insurance broker, plays golf and is very intimate socially with many of the officials and officers of the Southern Pacific Co.

"Mr. Levensaler knows the head ticket agent and a very high official of the defendant Southern Pacific Company. Mr. Levensaler is Juror No. 3.

"Mr. Knight is an important executive, sales manager, * * * of Schwabacher-Frey Company, a very large corporation in San Francisco, here which does a considerable business with the Southern Pacific Company. * * *

"And then Mr. Bright, Juror No. 10, although he is a retired postal clerk, he has ridden on many Southern Pacific trains, and is well acquainted with Mr. Goldsmith of the Traffic Department of the Southern Pacific Company" (R. 125).

Plaintiff stated that since a "very powerful showing" had been made that "the selection has been almost entirely of the business and executive type that is bound to have business with the Southern Pacific Company," it is "axiomatic that the final result is bound to be wrong (R. 126), and he then cited *Norris* v. *Alabama*, 294 U. S. 587, 589 (1935), arguing that where a jury selection may even appear fair, the Court should inquire whether there is discrimination "in substance and effect" against plaintiff who is a workingman (R. 126).

Owing to the lack of time for preparation during the shortened lunch period and the further fact that plaintiff's counsel was entirely unassisted by other counsel, due to war conditions, he failed to mention that said Juror Gale, an insurance broker, also admitted that he has "handled insurance of probably three of the company" (R. 108). (The record fails to show that he mentioned Angus McDonald, former president of the S. P. Co., as one of his clients.) Plaintiff also failed to mention that

Juror Kugelburgh was a department manager of an import and export concern doing $5,000 yearly business with the defendant (R. 118). The Court itself agreed to and did excuse those whose firms did over $50,000 yearly business with the Southern Pacific Co. (R. 113, 117, 119-20, 121). Plaintiff also failed to mention that Juror Hales, a rice broker, said he had dealings with the S. P. Co. and knew the "head of the Freight and Passenger Department" (R. 121); and that Juror Martens, retired commission broker, formerly did business with the Southern Pacific Co. (R. 106); and that Juror Morgan, retired railway postal clerk, had served on the S. P. Co.'s trains (R. 92). Thus, there was a total of 10 jurors in the box, or 83% who *admittedly* had some business or social or friendly ties with the defendant Co.

Also, for lack of time to prepare, plaintiff failed to mention that at least 19 or 79% of the 24 jurors actually examined were either presidents, vice-presidents or some kind of managers of large firms or independent business men or the wife of same, and all of these were in some way connected with the S. P. Co. (R. 86-123), except the wife of a civil engineer excused by defendant (R. 110, 111).

Plaintiff also failed to mention that *at least 21 or 87.5% of the 24* jurors actually examined were *admittedly* connected in some way with the *S. P. Co.* (R. 86-123).

Plaintiff also failed to mention that 5 or 20% of the 24 jurors actually examined were insurance brokers or insurance executives (R. 99-101, 107, 111, 115). This is out of all proportion. Incidentally, the Jury Commissioner is also an insurance broker (R. 46).

Plaintiff also failed to mention that only *one* out of the 24 or 4% was then a working man of the labor class, and by some "strange co-incidence" this one juror, Mr. Morgan, had formerly worked on the S. P. Co.'s trains as a *railway* postal clerk. By an even "stranger coincidence" he was

*then* employed by the Richmond Shipyard No. 1 which was obviously engaged in 100% *war work* and he would obviously lose his higher *daily wages* while he served as a juror for only $4.00 per day, but yet, the Clerk or Jury Commissioner *selected* him on the panel and he did *not* ask to be excused as a juror because of loss of pay (R. 88-89). The defendant Company "oddly" did *not* exercise its unused third peremptory challenge here.

Plaintiff also failed to mention that only 4 or 16% of the 24 jurors actually examined were women and *none* of these was the wife of a working man of the labor class (R. 91, 94, 95, 110, 111, 120).

*After* the Court had excused 7 jurors and plaintiff had exhausted his 3 peremptory challenges, the occupations of the 12 jurors consisting of 10 men and but 2 women, before whom plaintiff, a humble wage earner, was *compelled* over his vigorous objections to submit his case are as follows: *3* insurance brokers with addresses in the downtown financial district and who had social and/or business relations with the Southern Pacific Co. *officials* (R. 101-103; 107-109; 115-116), *1* rice broker, doing business with and acquainted with an *official* of the Southern Pacific Co. (R. 120-121), *1* wife of a partner of a large florist firm doing business with the S. P. Co. and with which defendant's counsel now does business (R. 94-95), *1* department manager of an export and import firm doing business with the S. P. Co. (R. 118), *1* retired commission broker who formerly did business with the S. P. Co. (R. 106), *1* sales manager or salesman of a large stationery firm doing business with defendant and who knew some S. P. Co. officials a long time ago (R. 88, 98, 99), *1* retired *railway* postal clerk who named two employees of the S. P. Co. with whom he was well acquainted (R. 105-106), *1* retired *railway* postal clerk who served on the S. P. Co.'s trains (R. 91-92) but was then employed in a

ship yard (R. 88), *1* retired "steel erector" (R. 122) (who definitely appeared to have been so employed in some executive capacity). (In a telephone conversation with said Juror Lutz on January 22, 1944, he stated that he had been a "*contractor* in the steel erection *business*" and was not employed in any actual labor work), and *1* widow of a clerk (who had worked for the Associated Oil Co.) (R. 131, 80).

Thus, there were 7 jurors who clearly represented the employer viewpoint and of the remaining 5, there were 3 who had business or friendly connections with the S. P. Co. This left plaintiff just 2 jurors who might at least appear to be fair. They were the "steel erector" and the "widow."

Plaintiff's motion to strike out the 12 jurors on his challenge for cause was denied and the trial proceeded.

Plaintiff testified that on said February 25, 1940, he was in a highly nervous condition and was suffering from delirium tremens and hallucinations that his life was in danger from attack and he kept asking for police protection from everyone including defendant S. P. Co.'s ticket seller. After a ticket was sold to plaintiff, defendant's railroad policeman was informed of plaintiff's crazy condition and he agreed to ride with plaintiff to protect him, but later got off the train and plaintiff got him to get back on again. When the train started, plaintiff discovered said policeman had gotten off again and plaintiff became panicky and fearful for his safety. Then plaintiff became greatly frightened when in the dim light he believed he saw a man leering at him and believed he saw a knife stuck into a passenger lying on a seat and believing he was about to be attacked, he suddenly opened the train window and proceeded to get out, believing the train was not moving.

When he became aware of the motion, he hung on until he fell to the ground and was injured.

Plaintiff was unable to produce any witnesses to his opening of said window but offered in evidence, among other matters, the rules of defendant S. P. Co. given to all its agents, "cautioning" them to exercise "*great* care" in the handling of demented and intoxicated passengers.

When plaintiff rested, defendant moved to dismiss but the Court stated that plaintiff had presented sufficient evidence "before the Court and jury" and promptly denied the motion.

Then defendant's agents testified. The only slight conflict presented was that said railroad policeman denied that he agreed to ride with plaintiff or that he actually got on the train, as testified to by an impartial witness furnished by defendant, but that he merely escorted plaintiff over to the train as requested. However, the following *vital* ADMISSIONS were made by defendant's agents on the three main issues:

(1) Defendant Company ADMITTED that shortly *before* the train started, defendant had *specific* and *direct notice*, given to its railroad policeman, that plaintiff had been "drinking awfully heavily lately" and was "acting CRAZY from drink" and the "help" of said railroad policeman was *needed* to even get plaintiff on the train as John Morris, a man with plaintiff, "was afraid" that plaintiff "might try to *run away*, having done so once before."

Defendant ADMITTED that sometime *before* the train started, its own ticket seller *observed* that plaintiff did "look drunk" and "He seemed *very* nervous and restless," and its own brakeman actually "*smelled*" liquor from

plaintiff, and its own railroad policeman "*smelled*" liquor from the said man with plaintiff and said ticket seller "got the impression that he (plaintiff) was *afraid* to leave the station."

Defendant ADMITTED that sometime *before* the train started, its own ticket seller received *information directly* from the plaintiff himself about his crazy condition when plaintiff told him that "some one *was after him*," and another ticket seller was told by plaintiff's wife that plaintiff "was somewhat nervous" and "was bothered by too many people" but he sold them three *coach* tickets.

Defendant ADMITTED that its own rules directed to its "Railroad policemen, conductors and ticket sellers" specifically required them to exercise "great care" in handling demented and intoxicated passengers and cautions them not to take such persons unless with an "attendant COMPETENT to afford them the *care and assistance* which their *condition required*" and then only "provided they purchase *drawing room or compartment* accommodations."

Defendant ADMITTED that shortly *before* the train started, its own railroad policeman told its own head brakeman that plaintiff was "acting CRAZY from drinking" and that said brakeman should "*keep an eye* on him" and said brakeman asked said "policeman what was *wrong* with him (the plaintiff)" after they both saw plaintiff get off the train *unattended* and "you could *smell*" the liquor from plaintiff.

Defendant ADMITTED thru its own conductor that it was the "duty" of said brakeman "to look after the passengers"; that it was the "usual procedure" for said policeman to notify "the brakeman or the conductor and tell them there is a man with a lot of drinks"; that if either said brakeman or policeman had performed his

"*duty*" and had given said conductor the "*information*" they had about the crazy plaintiff and his liquor smelling companion, said conductor would have "not permitted (plaintiff) to get on the train. We have a *right* to keep him from getting on the train," and if said conductor took plaintiff, he "would have asked for the officer" to go along or "would have stayed until I got him"; that it is "*part of the duty of the railroad* policeman to ride along with a crazy or intoxicated passenger and it is the "usual procedure" as said conductor has "taken on lots of police officers."

Defendant ADMITTED that with all of the above *specific* and *positive* information about plaintiff's crazy condition, it sold him a ticket and thus ACCEPTED him as a passenger and then neglected to give plaintiff even the slightest care, assistance or protection whatsoever which defendant knew his condition definitely required.

(2) Defendant also ADMITTED that its conductor and brakeman observed that plaintiff "was hanging out the window" for "all of" "a minute and a half," and that, upon signal, the train *could* and *did* stop in "less than a minute" and it backed up 600 feet which is the USUAL stopping distance at said place; that the stop signal was given "Immediately AFTER plaintiff had fallen to the ground below."

(3) Defendant also ADMITTED that the train cut off both of plaintiff's feet so that he was bleeding from his ankles; that defendant was "supposed to have" first aid equipment but had none on hand; that plaintiff was put in the baggage car and "from his open wounds, his ankles, there was a pint or *more* of blood that dripped out" with *nothing being done to stop the obvious bleeding* for ONE HOUR after the accident; that plaintiff was covered with just ONE *sheet* altho there was snow on the ground so that when he was

brought to Truckee "He was *shaking* from the pain or cold. It was a *cold* night; it was VERY COLD. I (a friend of defendant's agents) took my sweater off and put it around his shoulders."

Plaintiff moved for a directed verdict on *each* of the *three* main issues of negligence but it was denied (R. 923-4).

The jury arrived at a verdict for defendant in just fifteen minutes.

Plaintiff moved to set aside the verdict and enter judgment for plaintiff or grant a new trial (R. 76). This was denied.

An appeal was taken to the United States Circuit Court of Appeals on all issues. Plaintiff *emphasized* in his briefs and oral argument that he was not relying on any conflicting evidence but *solely* upon the above ADMISSIONS of the defendant, which alone *clearly* entitled him to judgment AS A MATTER OF LAW. The Circuit Court ignored plaintiff's said position and spoke of *non-existing* "conflicting" and "contrary" evidence (R. 137-138) and continued to overlook same in denying a rehearing (R. 139) altho it was again specifically called to the Court's attention that defendant's admissions ALONE entitled plaintiff to judgment.

## Jurisdiction of This Court

1. Jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 347(a) to review a decision of the United States Circuit Court of Appeals for the Ninth Circuit.

2. Said decision which petitioner seeks to have this Court review was entered on May 15, 1945 (R. 139). A petition for rehearing was denied on June 8, 1945 (R. 139).

3. The jurisdiction of the District Court in this case has already been settled by *Thiel* v. *Southern Pacific Co.*, 126 F. (2) 110; certiorari denied in 316 U. S. 698 (1942).

## Questions Presented

Plaintiff believes that all of the questions presented on his appeal are important and they appear fully in the Specification of Errors in the Brief in Support of the Petition herein. However, there are *two main* questions presented here which concern the violation of plaintiff's constitutional rights and plaintiff believes they involved questions of *national* importance:

1. Where the two Court officials who personally and freely select *all* the trial jurors on the panel ADMIT that in selecting jurors for *this case* they *purposely* selected mostly business men and those of the wealthier class who are in the majority, consisting of at *least* 50%, and they *purposely favored* them because they allegedly are more intelligent and that they *purposely excluded* ALL men from the building trades such as the iron craft, bricklayers, carpenters and machinists and workingmen such as longshoremen receiving a daily wage, and where it is ADMITTED that the selection of jurors is not apportioned by districts, but the majority of at *least* 50% is purposely selected from the business district of San Francisco and is connected with *big business* concerns, and where it is ADMITTED that no effort whatever is made to obtain a *cross-section* of the community as jurors, and where it is ADMITTED that more men than women are *purposely* selected, and where the EFFECT of such selection in this case is that only 4 out of 24 jurors actually examined are women and none of them is the wife of a workingman, and where the EFFECT of such selection is that 21 out of 24 jurors actually examined are connected with or tied up by business or social or friendly ties with a *very large and powerful* railroad corporation such as the defendant here, and where the EFFECT of such selection is that only 1 out of 24 or 4% have the occupation of a work

ingman which class represents at least 75% of the population and where plaintiff who is a humble workingman has exhausted all his three peremptory challenges and *vigorously objects* to proceeding to trial before the 12 jurors consisting of 10 men and but 2 women then in the box because some 10 of them have *admitted* social or business connections with said defendant, can it be held that plaintiff has received a fair trial by such a jury? Should not the whole panel have been stricken out as plaintiff requested? Should not the 12 jurors in the box be subject to the challenge for cause made by plaintiff?

II. (a) Where the evidence by ADMISSIONS of defendant's own agents *alone* CONCLUSIVELY shows that a railroad *accepts* as a passenger a person whom its ticket sellers previously know is afraid to leave its station, fearing that someone is about to attack him, and is bothered by too many people and looks drunk and is acting very nervously and rather peculiarly, and then its railroad policeman is asked for assistance to get him on the train and is specifically informed that said passenger has been drinking heavily lately and is acting crazy from drinking and might try to run away as he had done before, but, altho having ample time, said railroad policeman makes no personal or other investigation of said passenger or the man with him from whom he smells liquor before they get on the train for an all night ride in coach seats, and then its head brakeman observes that said passenger looks drunk and very nervous and smells the liquor from him and upon inquiring what is wrong with said passenger, he is told by said policeman to keep an eye on him because he is acting crazy from drink, and then, having ample time, but in violation of his specific duty to take care of passengers and notify the conductor, said brakeman fails to notify the conductor that said passenger is getting aboard in an abnormal, intoxicated and crazy

condition, and then later, said conductor smells liquor from and is informed by said man with said passenger that he must keep an eye on him but nothing whatsoever is done by any of said railroad's agents to protect said passenger either before or after the train is in motion altho said railroad's rules to all its agents specifically caution them to use great care in handling such passengers, and then said passenger while suffering from delirium tremens and under a delusion that he is about to be killed, suddenly opens a window of the moving train and gets outside and tho held on to by others for at least a minute and a half, finally falls to the ground and receives severe injuries, does said conduct of said railroad's agents in failing to care for, assist or guard said demented passenger constitute "slight negligence" on its part? If so, does the *antecedent* negligence on the part of said passenger in bringing about his said abnormal and crazy condition relieve the railroad of all liability for its said *immediate* negligence in making no investigation before accepting him as a passenger and in making no effort whatsoever thereafter to protect or care for said passenger before his injury? In other words, does the doctrine of "contributory negligence" apply in this case or is the *immediate* negligence of the railroad in failing to give any care the *proximate* cause of said passenger's injury? Under the above facts, is the railroad not clearly liable *as a matter of law?* Where the Circuit Court of Appeals ignores said *admitted* evidence, has not the plaintiff been denied his *"day in Court?"*

(b) Where the evidence CONCLUSIVELY shows that said railroad, upon discovery of said passenger hanging out the window of said train for at least one minute and a half, and having ample opportunity to give a stop signal which would have stopped the train in less than one minute, failed

to give any stop signal until *after* he fell to the ground, does this constitute "slight negligence" on the part of the railroad? If so, does the doctrine of "contributory negligence" apply here so that the *antecedent* negligence of said passenger in bringing about his said abnormal and crazy condition may relieve the railroad of all liability for its said *immediate* negligence in failing to promptly stop the train? Under the above facts, is the railroad not clearly liable *as a matter of law?* Where the Circuit Court of Appeals ignores said *admitted* evidence, has not the plaintiff been denied his "*day in Court?*"

(c) Where the evidence CONCLUSIVELY shows that the railroad failed to have any of the usual first aid equipment on hand and failed to give any first aid or proper care to said passenger after both of his feet were cut off by the train and nothing whatsoever was done to even stop the blood obviously dripping from his ankles for at least one hour after his accident, and he was covered with but one sheet and left freezing on a very cold night, does this constitute "slight negligence" on the part of the railroad? If so, does the doctrine of "contributory negligence" apply here so that the *antecedent* negligence of said passenger in bringing about his said abnormal and crazy condition may relieve the railroad of all liability for its said *immediate* negligence in failing to stop said flow of blood or give proper care? Under the above facts, is the railroad not clearly liable *as a matter of law?* Where the Circuit Court of Appeals ignores said *admitted* evidence, has not the plaintiff been denied his "*day in Court?*"

**Reasons Relied On for the Allowance of the Writ**

*1. Circuit Court of Appeals Is In Conflict With Decision of This Court.*

The blunt and frank *admissions* of the Clerk and Jury Commissioner, as set forth in detail above on pages 5 and 6

in the Statement of Matter Involved, show their *deliberate* and *purposeful* EXCLUSION of ALL building trades workers such as the iron craft, bricklayers, carpenters and machinists (R. 47) and all workingmen such as longshoremen or laborers receiving a daily wage (R. 29, 48) and their *purposeful* selection of a large majority of business men (R. 32) and those connected with *big business* concerns (R. 46) who constitute at LEAST 50% (R. 36), and their *purposeful* selection of at LEAST 50% from the *business* district of San Francisco (R. 51), their *purposeful* discrimination against women (R. 48), and their complete lack of effort, desire or attempt to obtain a *cross-section* of the community as jurors (R. 51, 48).

The above is in *direct* and *irreconcilable* conflict with the decision of this Court in *Glasser* v. *U. S.*, 315 U. S. 60, 85; 86 L. Ed. 680, 707 which emphatically holds:

> "For 'It is a part of the *established tradition* in the use of juries as instruments of public justice that the jury be a body *truly representative of the community*' • • • And its exercise (the selection of jurors) *must always* accord with the fact that the proper functioning of the jury system, and indeed, our *democracy itself, requires* that the jury be a 'body *truly representative of the community*', and *not* the organ of any special *group* or *class*. If that requirement is observed, the officials charged with choosing federal jurors may exercise *some* discretion to the end that *competent* jurors may be called. But they must *not* allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a *cross-section of the community*. Tendencies, *no matter how slight*, toward the selection of jurors by any method other than a process which will *insure* a trial by a *representative* group are undermining processes weakening the institution of jury trial, and should be *sturdily resisted*. That the motives influencing such tendencies may be of the best *must not blind*

*us* to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties."

Here, the jury has become the "organ" of the "*business* man" and those "connected with *big business* concerns" to the exclusion of the workingman who represents the *great* majority of our citizens.

The mere fact that the Circuit Court in its *opinion* chooses to play with words in saying that "the panel was not selected, but was drawn" (R. 134, 135), and the further fact that it *ignores* the purposeful exclusion of the working class and the purposeful discrimination against women (R. 135) does not in any way alter these ADMITTED facts, relied upon by plaintiff, as they plainly appear in the RECORD here and can be examined by this Supreme Court.

(a) The irregular jury selection methods used in this case and for many years prior thereto are not only contrary to the decisions of this Supreme Court but have become a PUBLIC SCANDAL casting a *bad odor* on the whole jury procedure in the Federal Court and urgently require correction by this Supreme Court to restore *public confidence*. Besides the unimpeached testimony here of two prominent and experienced jury trial attorneys that it was common knowledge (R. 21) that it was almost impossible to win a jury case (R. 25) against the defendant Southern Pacific Co. in the Federal Court because of the predominance of business people connected with said defendant Company (R. 15-22; 23-26), the decent civic minded men and women of San Francisco were finally aroused to have some official action taken.

(1) San Francisco Board of Supervisors Voted for Jury Reforms. After careful committee investigation of Fed-

eral jury selection methods by the Central Council of Civic Clubs, a long established, non-profit and non-political organization of some 50 improvement and civic clubs and the largest in San Francisco, said organization, on February 4, 1944, UNANIMOUSLY passed a motion "respectfully requesting the Presiding Judge of the local Federal District Court to call a meeting of the Judges to adopt rules to govern the selection of trial jurors for that Court so as to bring about a fair cross-section of all classes of our citizens as jurors."

When said presiding Judge politely replied that the above request would be "filed for future reference," the said organization adopted a resolution on March 3, 1944, complaining of the discrimination against workingmen and women and urging the Board of Supervisors of the City and County of San Francisco to similarly request the adoption of "rules to govern the selection of trial jurors for that Court so as to obtain a fair cross-section of the community as jurors without favoring or excluding any one group because of sex, race, occupation, wealth or social position, and to be fairly distributed among different geographic sections." A copy of said resolution is attached at the end of this Petition, marked "Exhibit A" and is hereby referred to and made a part hereof.

The San Francisco City & County Federation of Women's Clubs, the largest women's group in San Francisco, endorsed the above stand of the Central Council of Civic Clubs and its president, Mrs. Martha Field, spoke before the whole Board of Supervisors urging passage of said resolution. Also present as a part of Mrs. Field's committee and prepared to speak in favor of said resolution was Mrs. Henry Dippel, Jr., who was and is president of the San Francisco Women's Chamber of Commerce.

Said Board of Supervisors previously had held committee meetings and even sent a special request to the Federal Court officials to be heard in this matter but they expressed no desire to appear or dispute the facts. Then Supervisor Robert Miller Green, also at attorney, stated before the whole Board that he had previously worked as a deputy clerk of said Federal Court and he knew of his own knowledge that the conditions complained of were true. *At no time* did any supervisor deny the truth of said complaints nor did any citizen offer any proof against same. Then the Board voted 6 to 3 to endorse the Central Council's request. This occurred on April 17, 1944. A copy of said Board's Resolution is attached at the end of this Petition, marked "Exhibit B" and is hereby referred to and made a part hereof.

On April 24, 1944, said Board's action was commended in an editorial in the "San Francisco News," one of the four main dailies, in which it was stated: "It *surely* is a matter of PUBLIC INTEREST to have *entirely impartial* methods used in operating the jury system in the Federal as well as in the State Courts. What have the Federal Court authorities to say about it?" They have maintained a consistent *silence*. A copy of said editorial is attached at the end of this Petition, marked "Exhibit C" and is hereby referred to and made a part hereof.

Then said Resolution was vetoed by the Mayor on the *sole* technical ground that he believed it was the policy of the Board not to take action in matters over which it had no jurisdiction, and he specifically stated: "I am in no way passing on the merits of the issue, nor do I know whether the condition complained of is as stated." A copy of said Mayor's veto is attached at the end of this Petition, marked "Exhibit D" and is hereby referred to and made a part hereof.

A move to override the Mayor's veto failed by a divided vote of 6 to 5 with the *only* argument advanced that the Board had no jurisdiction and therefore the matter should be taken up with the Attorney General.

The Attorney General replied merely that it was up to the Federal District Court Judges to adopt jury selection rules, citing *St. Clair* v. *U. S.*, 154 U. S. 134, 148.

(2) The tremendous influence of the TWO BILLION dollar Southern Pacific Co. which had many "friends" in other places besides the Federal jury became apparent as its vicious control over and corruption of the Federal jury system by "subtle" methods was being exposed for the first time. It is plainly apparent from the RECORD here that the S. P. Co.'s influence dominated the Federal jury selection system *"in substance and effect"* as condemned by this Supreme Court in *Norris* v. *Alabama*, 294 U. S. 587, *589*, and a review and similar condemnation by this Court is urgent and necessary in the *public interest* to remove this encroachment on the American right of trial by an *impartial* jury.

This "control" by defendant S. P. Co. of branches of our government in California and elsewhere is neither new nor startling. It is an old sore which apparently had been cured in 1912, but by public apathy and "subtle" methods has gradually became a cancerous growth on the Federal jury system at San Francisco and probably elsewhere. The same old S. P. Co.'s evil influence on our judicial machinery is a matter of *history* as is clearly exemplified by reference to the following books and periodicals obtainable at the San Francisco *Public* Library:

> *"Big Business and the Bench.* The Part the Railways Play in Corrupting Our Courts." Everybody's Magazine, Vol. 26, pages 296-300, March 1912, discusses the corruption by the Southern Pacific Company of San

Francisco's courts and the State Supreme Court and tells how the people elected Hiram Johnson governor on his platform to put the Southern Pacific out of politics. (He became U. S. Senator and recently passed away.)

"*Scientific Corruption of Politics.*" Hampton Magazine, Vol. 24, pages 843-858, June 1910, says: "We shall say far too little if we merely say that this machine (Southern Pacific) dominated the government of California. It was the government and all the branches thereof, not merely directing but performing."

"*People or the Railroads.*" Hearst's Magazine, Vol. 25, pages 79-92, July 1910.

"*Short History of California.*" By Hunt-Sanchez, pages 585 and 586.

"*History of the Southern Pacific.*" By Daggett, pages 199-221.

This Supreme Court is the *last* bulwark to preserve our democratic jury system and it should strike here with the full force of its power against the evil control exercised by defendant Southern Pacific Co.

*2. Circuit Court's Decision Here Conflicts With Another Circuit Court.*

The Ninth Circuit Court's decision here is in *direct* and *irreconcilable* conflict with the Fifth Circuit Court's recent decision in *Calloway* v. *Hart*, 146 F. (2) 103 (1944, Certiorari denied 89 L. Ed. 895) where an unguarded intoxicated passenger walked out the door of a moving train, and the Court said on page 107: "A carrier is not required to accept an *intoxicated* passenger, but when a carrier, having knowledge of a person's intoxication, *accepts* him as a passenger, then the carrier is BOUND to exercise greater care with respect to him than if he were sober. * * * Omission of duty is negligence."

Under the ADMITTED facts of the *Thiel* case, the defendant Southern Pacific Co. had *specific* and *full* knowledge not only that the plaintiff Thiel was intoxicated but had reached the point where he was acting *crazy* but yet defendant *accepted* him as a pasenger and then did absolutely nothing to care for, assist or protect plaintiff. The admitted facts of the *Thiel* case are thus *much stronger* than those of the above *Calloway* case where there was no *specific* notice to the carrier and it becomes obviously inconsistent and ludicrous to permit recovery in said *Calloway* case and yet to deny recovery in the *Thiel* case.

The mere fact that the Circuit Court in its opinion in the *Thiel* case chooses to create a non-existing and imaginary "conflict" in the evidence does not in any way alter these *admitted* facts, relied upon by plaintiff, as they plainly appear in the RECORD here and can be examined by this Supreme Court.

(a) Incidentally, it may be here mentioned that on the question of *deliberate* exclusion of women from Federal juries there is an *irreconcilable* conflict between the District Courts. *U. S.* v. *Roemig*, 52 F. Supp. 857 (1943) disapproves but *U. S.* v. *Chaplin*, 54 F. Supp. 682 (1944) approves. It is submitted that this conflict should be resolved against any total or PARTIAL exclusion of women when done *purposely*.

*3. Circuit Court Has Departed From Usual Course of Judicial Proceedings.*

The Circuit Court's opinion here shows such a *shocking* DISREGARD of *admitted* and *undisputed* facts in the *Record* as to call for an exercise of this Court's power of supervision. The Circuit Court's conduct here in *overlooking* important points raised has actually deprived plaintiff of his "*day in Court*" and thus the supervision of this Court

is necessary if justice is to prevail and if our Constitution is to have any meaning. 36 *Corp. Juris. Secundum*, Sec. 204b(2), page 110, Note 10, citing *Le Tulle* v. *Scofield*, 308 U. S. 415, *416, 419* (1939), and *U. S.* v. *Rizzo*, 297 U. S. 530, 533 (1936).

In order to render a decision against plaintiff, the Circuit Court has gone to the unbelievable EXTREMITY of completely rejecting the *admissions* of defendant's own agents that they knew of plaintiff's crazy condition before the train started but accepted him as a passenger and then gave him no care whatsoever. Plaintiff and appellant Thiel *repeatedly* stated in his briefs and at the oral argument that he was relying SOLELY upon defendant's *admissions* to prevail here and was not in any way relying on the *very slight* conflicts in the evidence. In spite of this, the Circuit Court speaks of "conflicts" and "contrary" evidence (R. 137-8). How IS THIS POSSIBLE? Where is the "conflicting" evidence which PREVENTS plaintiff's recovery? Plaintiff could not possibly present any stronger evidence than the ADMISSIONS of defendant's own agents.

The Circuit Court goes even further and makes a *shocking misstatement* in saying "There was *no evidence* that the persons whose names were in the box • • • were *mostly* business executives or those having the employer's viewpoint'." (R. 135). The Clerk and Jury Commissioner, as set forth previously, testified bluntly and ADMITTED "*at least* 50%" (R. 32, 37, 46).

The Circuit Court also makes a *shocking misstatement* in saying: "There was *no evidence* that women were discriminated against in *placing names in the box* or in drawing names therefrom." The Jury Commissioner bluntly ADMITTED that he "PURPOSELY put on *more men* than women" and even gave his own peculiar reasons for so discriminating (R. 48).

The Circuit Court so far departs from usual judicial proceedings as to completely OMIT the Jury Commissioner's *clear admission*, while testifying, that he does "EXCLUDE PURPOSELY" "ALL the iron craft, bricklayers, carpenters and machinists" (R. 47). This is a MOST SERIOUS omission as plaintiff set forth *in his motion* to strike the panel that he was a "wage earner" and that "mostly business executives or those having the employer's viewpoint are *purposely* selected on said panel" (R. 10). This point was also emphasized in the briefs.

The Circuit Court also OMITS the Jury Commissioner's *admission* that he makes no effort to get a "CROSS-SECTION of the people of San Francisco with regard to wealth" (R. 50) altho he knew it was his "duty" to do so (R. 48). (See *Glasser* v. *U. S.*, 315 U. S. 60, *supra.*) This point was also emphasized in the briefs.

The Circuit Court completely OMITS all the facts showing that ADMITTEDLY the plaintiff's severed ankles were permitted to bleed freely for one hour after the accident and no first aid whatsoever was given and he was covered with just one sheet and left freezing on a very cold night. The *mere statement* of these *admitted* facts shows negligence sufficient to hold defendant liable for its lack of humanity *as a matter of law*.

All of the above omitted matters had been clearly set forth in the briefs and were *specifically* called to the attention of the Circuit Court in the petition for rehearing (R. 139) so there could be no oversight.

WHEREFORE, petitioner respectfully prays that the writ of certiorari be allowed and that said decision be reviewed and reversed.

Dated, San Francisco, California, August 10, 1945.

ALLEN SPIVOCK,
*Counsel for Petitioner.*

## EXHIBIT A

### RESOLUTION REQUESTING RULES FOR JURY SELECTION IN FEDERAL COURT

Whereas, a committee duly appointed by the Central Council of Civic Clubs, after investigation and examination of the present methods used to select trial jurors in the local Federal District Court, has unanimously found (1) that no rules are prescribed by the Judges to guide the Clerk and Jury Commissioner in making their selections, as is done in our local State Superior Court; (2) that one woman is purposely selected for every four men on the panel instead of an equal proportion; (3) that jurors are selected almost entirely from one class of our citizens, so that little or no representation is given to workingmen or their wives who constitute the greater part of our citizens, and

Whereas, the Central Council of Civic Clubs has recently unanimously passed a motion respectfully requesting the Presiding Judge of the local Federal District Court to call a meeting of the Judges to adopt rules to govern the selection of trial jurors for that Court so as to bring about a fair cross-section of all classes of our citizens as jurors, and

Whereas, the composition of a jury is a matter of vital concern to the public welfare and it is important that our citizens should be fully satisfied that a fair and impartial jury trial shall be received by them;

Therefore, be it hereby

Resolved: That the Central Council of Civic Clubs does hereby urge the Honorable Board of Supervisors of the City and County of San Francisco to also respectfuly request said Presiding Judge of the local Federal District Court to call a meeting of the Judges to adopt rules to govern the selection of trial jurors for that Court so as to obtain a fair cross-section of the community as jurors without favoring or excluding any one group because of sex, race,

occupation, wealth or social position, and to be fairly distributed among different geographic sections.

CENTRAL COUNCIL OF CIVIC CLUBS,
(Signed) CARROLL NEWBURGH,
*President;*
(Signed) PLESENCE M. CURRIE,
*Secretary.*

Adopted: March 3, 1944.

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## EXHIBIT B

### ENDORSING REQUEST OF CENTRAL COUNCIL OF CIVIC CLUBS THAT PRESIDING JUDGE OF FEDERAL DISTRICT COURT ADOPT RULES TO PROVIDE FOR A FAIR CROSS-SECTION REPRESENTATION OF THE COMMUNITY AS JURORS

Proposal No. 3929, Resolution No. —, as follows:

Whereas, it has been represented to the Board of Supervisors by the Central Council of Civic Clubs that after investigation and examination of the present methods used to select trial jurors in the local Federal District Court that no rules are prescribed by the judges to guide the clerk and jury commissioner in making their selections of jurors as is done in our local State Superior Court; that one woman is purposely selected for every four men on the panel instead of an equal proportion and that the jurors are selected almost entirely from one class of our citizens so that little or no representation is given to working men or their wives who constitute the greater part of our citizens; and

Whereas, the Central Council of Civic Clubs by motion respectfully requested the Presiding Judge of the local Federal District Court to call a meeting of the Judges to adopt rules to govern the selection of trial jurors for that Court so as to bring about a fair cross-section of all classes of our citizens as jurors; now, therefore, be it

Resolved, That the Board of Supervisors, if the condition complained of is as stated, endorse the request of the Cen-

tral Council of Civic Clubs requesting said Presiding Judge to give consideration to the adoption of such rules as will provide for a fair cross-section representation of the community as jurors without favoring or excluding any one group because of sex, race, occupation, wealth or social position and to be fairly distributed among different geographic sections.

April 17, 1944. Passed by Board. Ayes 6, No 3, Absent 2.

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## EXHIBIT C

(The following appeared on the editorial page of the San Francisco News on April 24, 1944:)

### Federal Court Juries

Although Supervisor Brown objected that they were out of their field of interest, a majority of supervisors voted recently to request judges to change the system of selecting jury panels in the Federal District Courts.

The objection seems to be that jury commissioners, intent upon securing jurors of intelligence to serve in the Federal Courts, have fallen into the habit of picking a high percentage of businessmen on their panels. Working men are largely excluded and the number of women is considerably less than the numbers customarily called for service in State Courts.

In damage and personal injury cases this practice militates against verdicts fair to defendants in poor circumstances, it is contended.

Perhaps the supervisors were not so much out of line after all in directing attention to this situation. It surely is a matter of public interest to have entirely impartial methods used in operating the jury system in the Federal as well as the State Courts.

What have the Federal Court authorities to say about it?

## EXHIBIT D

April 24, 1944.

To the Honorable The Board of Supervisors, San Francisco, California.

GENTLEMEN:

I disapprove Proposition 3929, the Resolution adopted by you on April 17, 1944—6 members voting Aye, 3 members voting No, and 2 members absent.

The Resolution recites that the Central Council of Civic Clubs has complained of the methods now used in selecting trial jurors in the local Federal District Court. It further recites that the Central Council of Civic Clubs has requested the Presiding Judge of the local Federal District Court "to call a meeting of the Judges to adopt rules to govern the selection of trial jurors for that Court so as to bring about a fair cross section of all classes of our citizens as jurors".

Based on this representation and saying "if the condition complained of is as stated", you endorse the request of the Central Council of Civic Clubs, asking the Presiding Judge of the local Federal District Court "to give consideration to the adoption of such rules as will provide for a fair cross-section representation of the community as jurors without favoring or excluding any one group because of sex, race, occupation, wealth or social position and to be fairly distributed among different geographic sections".

I am in no way passing on the merits of the issue, nor do I know whether the condition complained of is as stated; but I do point out that the adoption of this Resolution is in direct conflict with your own policy and I refer to Resolution 589 (Series of 1939) adopted by the Board of Supervisors on October 9, 1939, entitled "DECLARATION OF POLICY TO TAKE NO OFFICIAL ACTION ON MATTERS OVER WHICH THE BOARD HAS NO JURISDICTION." For ready reference, I attach a copy of that

Resolution. The record shows no repeal of this Resolution adopted almost five years ago.

Sincerely,

(Signed) ROGER D. LAPHAM,
*Mayor.*

RDL. H. W.

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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# No. 349

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GILBERT E. THIEL,

*Petitioner,*

*vs.*

SOUTHERN PACIFIC CO., A CORPORATION,

*Respondent*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### I. Opinion of the Court Below

The Circuit Court's opinion is reported in — F. (2) —, and appears on pages 132-138 of the Record.

### II. Jurisdiction of This Court

A full statement of the jurisdiction of this Court appears on page 15 *supra*, and for brevity is not repeated here.

### III. Statement of the Case

A full statement of the case appears *supra* commencing on page 1, and for brevity is not repeated here.

## IV. Specification of Errors

The Circuit Court of Appeals erred in affirming the errors of the District Court as follows:

I. Irregularities in selection of jury preventing fair trial to plaintiff.

A. The Court erred in denying plaintiff's motion to strike out the entire panel as the evidence plainly showed that the method of selection is wholly arbitrary and distinctly favors one class or group and was so intended (R. 24, 52).

B. The Court erred in denying plaintiff's motion to strike out his demand for a jury trial because plaintiff could not hope to get a fair trial by a jury drawn from said panel (R. 70-72).

C. The Court erred in denying plaintiff's motion to strike out the 12 jurors in the box at the trial because plaintiff had exhausted his three challenges and it then appeared that numerous jurors were admittedly close friends of defendant and plaintiff could not get a fair trial from such a jury (R. 124-126).

II. The evidence is wholly insufficient to sustain the verdict and judgment for defendant.

A. The Court erred in denying plaintiff's motion for a directed verdict at the trial and in denying his motion to set aside the verdict and enter judgment for plaintiff because the evidence conclusively showed much more than the "slight negligence" of defendant as required by law in the following particulars:

1. Defendant's admitted failure to give any care or protection to plaintiff as a known demented, crazy and abnormal person whom defendant accepted as a passenger.

2. Defendant's admitted failure to stop the train, altho it had ample time to do so, when plaintiff was discovered by defendant in peril hanging from the train window for at least 1½ minutes.

3. Defendant's admitted failure to give any first aid or to stop the flow of blood from plaintiff's severed ankles for at least one hour after the accident.

Furthermore, after defendant's evidence clearly showed its full knowledge of plaintiff's abnormal and crazy condition, the Court erred in permitting defendant to still claim an alleged defense of "contributory negligence" to the above because of plaintiff's antecedent negligence in bringing about his said condition before he was accepted as a passenger. The defendant's negligence in failing to protect its accepted passenger was the sole, proximate cause of the accident.

B. The Court erred in denying plaintiff's motion for new trial on all of the above grounds or any of them.

III. The Court's error in its admission of paragraph VII of an annulment suit against plaintiff with reference to his alleged suicide attempt in going thru the train window was highly prejudicial as it was incompetent and was not an essential allegation and did not become an admission by plaintiff because of his default. Denying plaintiff his right to explain the full circumstances of said default including his attempt to have his wife's attorney remove the false allegation about his attempted suicide was further error.

IV. Errors in instructions to jury.

A. All of the numerous instructions proposed by the defendant and given by the Court re alleged "contributory negligence" of plaintiff were highly prejudicial error

because they were not supported by any evidence as defendant full knew of plaintiff's abnormal and crazy condition when it accepted him as a passenger.

B. Other instructions given but excepted to by plaintiff told the jury how to decide the case and how to decide the facts and indicated that a crazy person such as plaintiff could be guilty of negligence in a legal sense.

C. The jury was charged before any of plaintiff's objections to 55 of defendant's lengthy instructions were heard by the Court and this was in violation of a reasonable construction of Rule 51 and the understanding at the pre-trial conference, and deprived plaintiff of any reasonable or practical opportunity to make known his detailed objections.

V. The Court erred in preventing plaintiff from taking depositions after the verdict to prove defendant's trickery and unfair tactics at the trial in concealing from plaintiff a "surprise witness" on a "surprise issue" of alleged suicide, altho these were to be made known at the pre-trial conference.

A. The Court had no discretion to deny taking of said depositions while a new trial motion was pending, because under the new Rules, depositions are freely allowed, without leave of Court, after an answer has been served.

B. If the Court had discretion, it was an abuse of same to deny taking of said depositions here, because the whole purpose of the new Rules is to bring out the truth rather than to conceal it.

VI. The Court erred in denying plaintiff a new trial because the unfair tactics of defendant in producing a "sur-

prise witness" and "surprise issue" of alleged suicide attempt prevented plaintiff from obtaining a fair trial.

## ARGUMENT

### I. Irregularities in the Selection of Jury Preventing Fair Trial to Plaintiff

*A. Plaintiff's Motion to Strike Out Entire Panel.*

Plaintiff's counsel had been firmly advised by numerous attorneys who had had recent *experiences* that it would be impossible to win a jury trial against the Southern Pacific Co. in the Federal Court because the jurors were all friendly to said Company, and the proof of the matter was that said Company never lost a jury case there. He decided to make a *personal* investigation and in October, 1942, he went to interview the Clerk and Jury Commissioner who each select one-half of the 300 names to serve as jurors. He was *astounded* and *shocked* to hear from their own lips that they were guided by no rules of the Court in selecting jurors and could pick whomsoever they wished but that they preferred and *purposely* selected business men and *deliberately* omitted the working class mainly because they usually did not want to serve. Plaintiff's counsel was further astounded and shocked when he examined the Clerk's records and altho he found numerous damage actions filed against the Southern Pacific Company, it had finally prevailed in every jury case actually tried during the previous *nine* years (R. 11-15).

Faced with this alarming and almost unbelievable situation, plaintiff moved to strike out the entire jury panel and to order "selection of a new panel on a basis of fair repre-

sentation to all classes of wealth, occupation, sex and race, and by district representation, after investigation of prospective jurors to determine whether they are connected with or prejudiced in favor of such gigantic corporations as said Southern Pacific Company which *continually* have litigation pending before ths Court" (R. 9). Said motion then specifically listed 7 grounds which are summarized as follows: 1. The Judges of the District Court have failed to prescribe any rules whatever of qualifications or otherwise in selection of jurors, as they are required to do by law. 28 U. S. C. A. 411 and Calif. C. C. P. 204b.

2. That mostly business executives or those having the employer's viewpoint are *purposely* selected, thus discriminating against the working classes who are in the vast majority; that plaintiff was a *wage earner* before his accident.

3. That a larger proportion of men jurors are *purposely* selected, thus discriminating against women as jurors.

4. That the selection of jurors is wholly arbitrary because no examination of prospective jurors is made to ascertain their fitness or prejudices; that this is contrary to the method used in the highest State Court. 28 U. S. C. A. 411 and Calif. C. C. P: 204c, 205.

5. That no effort is made to proportionately or fairly represent citizens of all races on said panel, thus systematically excluding Negroes and Chinese.

6. That no effort is made to apportion jurors by districts when selecting them, as required by law. 28 U. S. C. A. 413 and Calif. C. C. P. 206.

7. That by reason of the above selection methods, defendant Southern Pacific Company has been able to prevail in all its jury trials during the past 9 years and plaintiff has

ample reasons to fear that he will not get a fair trial by jury and unless this motion be granted, he will be "in substance and effect" denied his right to trial by an *impartial* jury as guaranteed him under the Federal Constitution (*Norris* v. *Alabama*, 294 U. S. 587, 589).

With said motion, plaintiff's counsel filed his Affidavit setting forth facts to substantiate the above (R. 11).

The hearing on said motion came up on November 9, 1942 before Judge John C. Bowen who was here temporarily from Seattle, Washington.

Vincent W. Hallinan, an attorney of 22 years' practice and considerable successful jury trial experience testified (R. 16-23) that a few years ago he represented the plaintiff in *Kurtz* v. *S. P. Co.*, #20,216, before a jury and found it "selected almost exclusively from business executives, wealthy persons; no such thing as a workingman has appeared on the jury, or *workingmen's wives*. I did not see any in that case" (R. 17); that others were, for the most part, connected with the Southern Pacific in one way or another; that he did not remember any wage earners on the panel he selected the jury from; that it was a "typical" Federal Court jury; that the verdict was for the defendant S. P. Co.; that it was a very clear case for the plaintiff and he was astounded by the verdict; that the plaintiff would have prevailed in the State Court; that he had just come into *Hubner* v. *S. P. Co.* for the plaintiff and since there was no ground for remand, he moved to dismiss for the purpose of filing in the State Court; that he wrote to his client saying that there was a very good chance to recover in the State Court but no hope of recovery in the Federal Court and he advised payment of the $271.50 penalty to get a dismissal and file in the State Court and *this was done*; that the difficulty of winning damage cases before a jury in the Federal Court is *known to everyone*

because the jury is so constituted as to be prejudiced against cases of this kind; that it would be a waste of time, effort and money to try such a case before a Federal jury; that out of a population of 635,000 in 1937 in San Francisco, there were 40,000 skilled building trades workers and 60,000 laborers and skilled mechanics or a total of 100,000 hired men; that "about *three quarters* of the population were either working people or members of their family" (R. 22).

On cross-examination, he said he did not ask for a new trial in the *Kurtz* case as he would have despaired of winning it in the same Court before another jury.

Clifton Hildebrand, an attorney of about 22 years' practice and considerable successful jury trial experience, testified (R. 23-27) that a few years ago he represented the plaintiff in *Merritt* v. *S. P. Co.*, #20,238; that the verdict was for the defendant altho, it being a passenger case, ordinarily there would be no question of a recovery; that the jury was a typical jury in the Federal Court; "they were all big business men, contractors, insurance company executives, practically all of them from California Street or Sansome Street which is the *financial* district, hardly any of them from the humble walks of life, no laboring people at all" (R. 23-24). That there were no women at all and no wage earners or working class people on that panel; that he tried many cases in this Federal Court and did not recall any from "the laboring class, like carpenters *or their wives*, or bricklayers, or shoe clerks, store clerks, nobody at all from any of those, no one except business executives with an occasional clerk, perhaps, from some of their offices" (R. 24). That he has tried about 25 personal injury cases for plaintiffs in the Federal Court; that during the past nine years, he never won a jury case altho he had much success with juries in the State Courts; that he finally had to stop trying cases in the Federal Court because he repre-

sented laboring people and they could not get a fair trial before a jury of "big business men, insurance men and big executives"; "that the same cases that could be won in the State Court would be lost in the Federal Court"; that it is impossible to win the case in the Federal Court unless "it is just an open and shut case," but where there is any "doubt" or if the jury "can find any possible reason, they will go for the defendant, in my *experience*" (R. 25); that he is the attorney for the Building Trades Council in Alameda County and for many of the Railroad Brotherhoods; that there are about 70,000 building trades mechanics in Alameda County, 30,000 in the Central Labor Council and about 25,000 operating with different railroad brotherhoods, and "with their families they constitute fully 85% of the population of some 300,000" (R. 26).

On cross-examination, he said he made an investigation of the whole panel and found no labor people from Alameda County or San Francisco County on it or on his jury.

Walter B. Maling, the Clerk, and William Mikulich, the Jury Commissioner, testified as set for the above in the Petition commencing on page 5, bluntly *admitting* their *deliberate* and *purposeful* discrimination in favor of big business people and against workingmen and women, and *admitting* their failure to even try to get a *cross section* of the community.

Deputy Clerk Carl Calbreath testified that since 1940, "I can say that there were a large number (of working people), *sometimes* 25%, sometimes 35%. A great many of those however, were *excused*. I have a list of a *few* of them that did serve on the jury" (R. 55); that usually *about* 50% of the jurors are "so-called wealthier business men" (R. 58).

Arthur B. Dunne, defendant's attorney, testified that he *regularly* transfers *all* personal injury cases from the State to the Federal Court where he has not lost one in the past

nine years (R. 66), because he finds the Federal Court jurors are so "fair" (R. 65).

Judge Bowen bluntly stated that it was not for him as an outside Judge to change a system so long in operation and denied the motion (R. 68).

It is submitted that in view of the above *uncontradicted* evidence, it was error to deny plaintiff's motion to strike out the whole panel.

*The Law Applicable*

28 U. S. C. A. 411. Jurors shall have "same qualifications" as highest State Court.

*Pointer* v. *U. S.*, 151 U. S. 396, *407*: State law generally controls "qualifications" but "the mode of *designating* and *impanelling* jurors • • • is *within the control*" of the Federal Court.

*St. Clair* v. *U. S.*, 154 U. S. 134, *148*. Quotes and approves *Pointer* v. *U. S.*

*California Code of Civil Procedure*, Section 198 which gives a juror's *qualifications*, followed by the Federal Court, says: "A person is competent to act as a juror if he be: 1. A *citizen* of the United States. • • • 2. In possession of his natural faculties and of ORDINARY *intelligence* and not decrepit." It is evident that the Federal Clerk was not following the above when he "generally" selected "the names of people who I think, *from their occupation and residence*, would be *intelligent* people to act as jurors in this Court" (R. 28). Altho said statute merely calls for those of "*ordinary* intelligence," said Clerk was interested only in those having such an "*occupation* and *residence*" as would indicate "substantial salaries" and "responsible positions" (R. 36-37), and thus, allegedly "superior intelli-

gence." However, the controlling statute speaks only of "*ordinary* intelligence."

*Mamaux* v. *U. S.*, 6 Cir., 264 Fed. 816 (1920). *Purposeful* exclusion of *wage earners* from jury panel would be ground for quashing whole panel.

*Walker* v. *U. S.*, 93 F. (2) 383. Selection of "business men" to exclusion of wage earner is improper.

*Glasser* v. *U. S.*, 315 U. S. 60, 85. Jury must be "truly representative" and a "*cross-section* of the community" and "*not* the organ of any *special group or class.*" (See Petition, pages 19 and 21 *supra.*)

*California Code of Civ. Proc.* 204b, c, d, e, 205, 206. Court prescribes rules; "diligent" inquiry re qualficatons; judicial supervision; apportionment by districts.

28 U. S. C. A. 413. Apportionment by district *required* for "*impartial* trial." The Jury Commissioner testified "at LEAST 50%" were selected from the "business district of San Francisco" (R. 51).

*Norris* v. *Alabama*, 294 U. S. 587, 589 (1935). Altho selection of jurors may be fair on its face, administrative officers may effect discrimination. Court will *inquire also* whether right to a fair trial has been "denied in *substance and effect.*"

*State of Minn.* v. *County Board*, 213 N. W. 545 (1927); 52 A. L. R. 916, *918*. "• • • there must be no distinction or discrimination against any particular class because of race, sex or occupation." "A county board has no more right to discriminate against them (women) in preparing jury lists than it would have to discriminate against a class of persons engaged in a particular occupation as, for example, farmers, merchants or *day laborers.*" But here the Federal officials did discriminate against those receiving a daily wage and called *none* of them (R. 29-31; 47-48).

*State* v. *Bolin*, 10 Wyo. 439, 471. "• • • where • • • there has been intentionally omitted from it the great mass of the names of those whom they know, or believe to be qualified, such a list would not be a legal jury list. It would be the duty of the trial court to so find.

35 *Corpus Juris, Sec.*, page 1133, Sec. 135.

7th Amendment to Federal Constitution. "Right to trial by jury shall be preserved."

*Clinton* v. *Englebrecht*, 13 Wall. 343 (1872). Where the jury was not selected in conformity with law, a challenge to the array should have been allowed. (Judgment reversed.)

It is respectfully submitted that *U. S.* v. *Ballard*, 35 F. Supp. 105, followed by *U. S.* v. *Chaplin*, 54 F. Supp. 682 (1944), holding that in a criminal case, a panel of no women jurors was permissible, should be disapproved because it violates the 14th Amendment to the Federal Constitution and the Court there failed to distinguish that it is bound only by the "*qualifications*" provided by State law and not by the decisions of the State Court on the *mechanics* of obtaining a jury. The above State "qualifications" do *not* exclude women. However, a much better reasoned case is *U. S.* v. *Roemig*, 52 F. Supp. 857 (1943), holding *directly to the contrary*. The total or *partial* exclusion of women as jurors, especially when done "PURPOSELY", as here, *Record 112*, cannot be tolerated under our modern viewpoint and laws. It is submitted that this sharp conflict between the District Courts on such an important issue should now be settled by this Court.

*B. Plaintiff's Motion to Strike Out His Demand for Jury Trial.*

After denial of said motion to strike the panel, plaintiff's counsel was so sincerely and firmly convinced from he evi-

dence above that the jury selection system distinctly favored such a gigantic corporation as defendant Southern Pacific Co. that he was *compelled* to move to strike out his demand for a jury. As would be expected from the above evidence, defendant refused to give up its unfair advantage but stoutly *insisted* on a jury trial (R. 70-71). What an odd situation! The crippled plaintiff would have to appear before the jury in a wheel chair but this did not perturb defendant one whit.

*C. Plaintiff's Motion to Strike Out the 12 Jurors in the Box.*

After the actual examination of jurors at the start of the trial, when the last vestiges of any possible doubt about the Southern Pacific's influence over the jury were removed, plaintiff made his final, desperate effort to get a fair trial by moving to strike out the 12 jurors in the box for cause. It was plainly evident that it was impossible to get a fair jury from said panel as practically all were obviously and even *admittedly* connected by business, social or friendly ties with defendant S. P. Co.

To avoid needless repetition, reference is hereby made to the Petition, pages *6* to *9 supra*, showing in detail the almost unbelievable influence of Defendant S. P. Co. over the panel and jury of 12 which made it impossible for plaintiff to win here even tho the defendant *admitted* its negligence on all 3 main issues.

Plaintiff testified that his main trade was as a "mechanic." How could he hope to get a fair trial from a jury dominated by defendant S. P. Co.'s business and social friends?

It is respectfully submitted that the denial of plaintiff's motion to strike out said 12 jurors was error and the sub-

sequent trial by said jury was a mockery of justice and a sad reflection on the Federal jury system.

In *Pratt* v. *Pratt;* 74 Pac. 742, 744, 141 Cal. 247, 252, the State Supreme Court, in reversing the lower Court, said: "The trial of a case should not only be fair in fact, but it should *also appear fair.* And where the contrary appears, it SHOCKS THE JUDICIAL INSTINCT *to allow the judgment to stand.*"

## II. The Evidence Is Wholly Insufficient to Sustain the Verdict and Judgment

### *A. Plaintiff's Motion for Instructed Verdict Should Have Been Granted.*

Said motion was made upon all *three* main issues and charges of negligence and should have been granted on *all* of said issues.

#### *Only "Slight Negligence" Holds Carrier Liable*

The *admissions* of defendant's agents conclusively show they were *grossly* negligent in the three main particulars set forth by plaintiff. However, the law only requires a showing of "*slight* negligence" of a *carrier* to hold it liable for injuries to a *passenger.*

In *Kline v. Santa Barbara, etc. Ry. Co.,* 150 Cal. 741, 745, the Court quotes with approval: "• • • 'passenger carriers bind themselves to carry safely those whom they admit into their coaches, as far as humar care and foresight go, that is, for the *utmost care and diligence* of *very cautious* persons, and of course they are responsible for any, even the *slightest* neglect • • • '." The Court then quotes California Civil Code Section 2100 and adds on page 746: "• • • the *carrier must exercise the utmost care, diligence and foresight of a very cautious person.*" (Emphasis by Court.)

*Fitzgerald* v. *S. P. Co.*, 36 Cal. Ap. 660, 663 (1918) holds that a carrier of passengers is liable for "*slight* negligence."

The Nevada Courts similarly hold that a carrier must exercise the "highest degree of care" and is liable for the "*slightest* neglect" towards a passenger.

*Sherman* v. *S. P. Co.*, 111 Pac. 416, 426, 33 Nev. 385, and *Murphy* v. *S. P. Co.*, 101 Pac. 322, 31 Nev. 120.

The Federal Court rule appears in *Pennsylvania Co.* v. *Roy*, 102 U. S. 451, 456, where the Court said: "• • • the carrier is required, as to passengers, to observe the *utmost* caution characteristic of *very* careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been *avoided* or *guarded against* by the exercise on his part of *extraordinary vigilance*, aided by the *highest* skill." The Court further says the carrier is liable for the "*slightest* negligence."

To the same effect is *Nat. Labor, etc.*, v. *Union Pacific*, 9th Cir., 99 F. (2) 153, 175.

Thus, the ordinary rules of negligence do not apply to the passenger-carrier relationship where the carrier must use the *utmost* care and is liable for the *slightest* neglect causing injury to its *passenger*.

*No Substantial Conflict or Real Defense Here*

The conflict in the evidence of both parties here is extremely slight and there is no *substantial* evidence to constitute a *real* defense to plaintiff's complaint. Apparently, there are but two minor points of conflict, neither of which can defeat plaintiff's right to recover here because there are *numerous* and *ample admissions* of negligence by defendant's own agents on the IMPORTANT points, as is plainly

shown by their testimony, answers to interrogatories, depositions, etc., appearing in the RECORD here.

The first conflict is as to only that portion of plaintiff's testimony that defendant's railroad police officer agreed to ride the train with him because of his fears for his safety and that said officer actually *got on the train* and sat with him. Altho said police officer denied this, Arthur Rippetoe, an *impartial* and *unimpeached* witness obtained by plaintiff from defendant's answer to his interrogatory, testified *positively* that he saw plaintiff and Morris get off the train and come back on *with* said railroad police officer who was talking with them and they all walked *down the aisle of the train* and *all sat down together*.

The second conflict is as to that portion of the conductor's testimony that he was actually assisting Morris in holding on to plaintiff's coat while he was hanging out the window. Again, said Rippetoe testified *positively* that *only he and Morris* were holding plaintiff and it was *impossible* for the conductor or anyone else to get in between the seats to grab ahold of plaintiff, but the conductor *just stood there* and said: "Let him go."

Now, let us turn to the *undisputed* evidence which consists almost entirely of the *admissions* of the defendant corporation itself which can only speak and act *thru its agents*. It is upon this *undisputed* evidence plainly showing much more than defendant's "*slight* negligence" that plaintiff is entitled to judgment *as a matter of law* because there is no real defense here whatever. It is not necessary for plaintiff to rely upon any of the above conflicting evidence to recover here as the defendant itself *conclusively admits* its negligence towards plaintiff as will be and has been shown.

And finally, defendant's alleged defense of "contributory negligence" is entirely *unavailable* here because it

voluntarily *accepted* plaintiff as a passenger with full knowledge of his abnormal and crazy condition.

Thus, there is no *substantial* evidence or *any* evidence to support the verdict and judgment for defendant.

*1. Admitted Failure to Care for Accepted Passenger Known to Be Demented.*

To avoid repetition, reference is hereby made to the Petition, pages *10* to *12* above, showing that defendant's own agents freely ADMITTED they had full knowledge of plaintiff's *abnormal* and *crazy* condition for about ten hours *before* he was sold a ticket and thus *accepted* as a passenger. Yet *admittedly*, defendant's said agents gave plaintiff no care whatsoever. A reading of the RECORD merely serves to emphasize defendant's knowledge and its callous neglect.

*The Law Applicable.*

The rules of defendant S. P. Co. specifically state that its agents may refuse to accept an intoxicated or abnormal person as a passenger. This rule is backed by the courts. *Calloway* v. *Hart*, 146 F. (2) 103 (1944); *Benson* v. *Tacoma Ry.*, 98 Pac. 605, 51 Wash. 216. Defendant's ticket sellers Forsyth and Wogan *knew* that plaintiff was acting crazy and afraid to leave the station and looked drunk, nervous and restless and was bothered by too many people but they made no investigation whatever of plaintiff himself and he was *accepted* as a passenger and sold coach instead of drawing room tickets in violation of the Company's *specific* rules.

After a carrier has notice, by personal observation or information, or where it should know by the exercise of reasonable care, of a person's abnormal or intoxicated condition, and it *accepts* him as a passenger, it is well established that the carrier has the *duty* to give him such *special*

*care and protection* as his *condition* may require, and a "*higher* degree of care" is required.

*Calloway* v. *Hart*, 5 Cir., 146 F. (2) 103 (Nov. 1944);
*Dokus* v. *Palmer*, 33 A. (2) 315, 317 (Conn. 1943);
*Bourgeois* v. *Toye Bros. Yellow Cab Co.*, 192 So. 379 (La. 1940);
*Jameitis* v. *Wilkes-Barre Ry. Co.*, 121 A. 317, 277 Pa. 437;
*Fox* v. *Michigan Central R. Co.*, 101 N. W. 624, 626, 138 Mich. 433;
*Olson* v. *Minneapolis, etc., Ry. Co.*, 175 N. W. 371, 372;
*Castel* v. *American Air Ways*, 88 S. W. (2) 976, 979. (Ky.)

The defendant's duty to exercise the "utmost care and diligence" requires it to make *reasonable inquiry* to safeguard its passengers from injury to themselves or others. In *Westwater* v. *S. P. Co.*, 38 Cal. Ap. (2) 369; 101 Pac. (2) 154 (1940, Hearing denied by Supreme Court), the railroad was held liable because it did not investigate even a well-mannered dog's tendencies, habits, size, etc., *before* accepting the dog which later bit a child without provocation.

After a carrier has notice, by personal observation or information, or where it should know by the exercise of reasonable care, of a passenger's demented or intoxicated condition, altho the passenger's injury results from his *own voluntary* or careless act in falling or jumping off a moving train thru a window or door, if the carrier did *not* exercise the "*utmost care*" to protect him, it IS LIABLE nonetheless.

*Calloway* v. *Hart*, 5 Cir., 146 F. (2) 103 (Nov. 1944);
*Stewart* v. *Houston Ry. Co.*, 229 S. W. 577;
*Dokus* v. *Palmer*, 33 A. (2) 315 (1943);
*Pittman* v. *Hines*, 221 S. W. 474;

*Jameitis* v. *Wilkes-Barre Ry. Co.*, 121 A. 317;
*Benson* v. *Tacoma Ry. Co.*, 98 Pac. 605;
*Wheeler* v. *Grand Trunk Ry. Co.*, 50 A. 103.

*Alleged Contributory Negligence as a Defense*

When a carrier has notice of a passenger's intoxicated or crazy condition, but accepts him as a passenger, and then fails to protect him, it cannot invoke the doctrine of contributory negligence to escape its liability. The *proximate* cause of the injury is not the passenger's *antecedent* negligence in becoming intoxicated or crazy but it is the *immediate* negligence of the carrier in failing to protect him.

13 *Corpus Juris. Sec.*, page 1552, Sec. 782;
*Dokus* v. *Palmer*, 33 A. (2) 315; 130 Conn. 247 (1943), where the passenger was able to walk by himself and made no disturbance while on the train;
*Bourgeois* v. *Toye Bros. Yellow Cab Co.*, 192 So. 379, 381 (La. 1940);
*Wheeler* v. *Grand Trunk Ry. Co.*, 50 A. 103; 70 N. H. 605; 54 L. R. A. 955, citing 10 *American Juris.*, page 284;
*Paris & G. N. R. Co.* v. *Robinson*, 140 S. W. 434, 436; citing *Hutchinson on Carriers* (3d Ed.), Sec. 1230;
Also see *Brashears* v. *Union Dredging*, 9th Cir., 104 F. (2) 762 (1939) which is not even a passenger case where the "slight negligence" rule applies.

*Dictates of Humanity to Be Considered Here*

In *Olson* v. *Minneapolis, etc. Ry. Co.*, 175 N. W. 371, 372, the Court said: "* * * a carrier whose agents receive and transport a drunken passenger are *bound* to exercise towards him a higher degree of care than is exercised towards the other passengers, and to employ such measures for his protection as HUMANITY dictates."

See also *Louisville, etc. Ry. Co.* v. *Gregory's Adm'r*, 133 S. W. 805, *811*, and *Paris, etc., Ry. Co.* v. *Robinson*, 140 S. W. 434, *437*.

*2. Admitted Failure to Stop Train When Plaintiff Discovered in Peril.*

Defendant's conductor ADMITTED that plaintiff "was hanging out the window" for all of "minute and a half," and that *he* gave the stop signal "Immediately *after* plaintiff had fallen to the ground below," and that, upon signal, the train *could* and *did* stop in "less than a minute," and it backed up 600 feet which is the USUAL stopping distance. It is simple arithmetic and INESCAPABLE logic that the signal was negligently delayed until *after* plaintiff fell to the ground as *positively* ADMITTED by defendant in answering plaintiff's interrogatories, OR if the signal was *also* given immediately by the brakeman as he *belatedly* informed defendant and finally testified to at the trial, then the engineer negligently *delayed* stopping the train for a full minute and a half while plaintiff was hanging out the window. In EITHER EVENT, defendant is liable AS A MATTER OF LAW. There is no "conflict" or at least there is none legally sufficient here to defeat plaintiff's charge of "slight" negligence by defendant in not stopping the train altho it had adequate time before he fell to the ground and was *thus* run over by the wheels of the train.

*The Law Applicable*

In *Hellman* v. *Los Angeles Ry.*, 27 Pac. (2) 946, 951 (Pet. for hearing denied by Supreme Court), 135 Cal. Ap. 627, 642, a woman was injured in boarding a street car and the court said: "Under plaintiff's theory she was then a *passenger* and entitled to be protected *as such* by the exercise of the *highest degree* of care."

13 *Corpus Juris. Sec.*, page 1552, Sec. 782, cited *supra*, says: "Where a carrier has the last clear chance to prevent the injury to a negligent passenger, it will be liable in damages for its failure to do so." Thus, even if we assume that Thiel was negligent in getting out the window, defendant S. P. Co. would still be liable for its negligent delay in giving the stop signal or stopping the train.

*3. Admitted Failure to Give Any First Aid.*

Defendant's own agents ADMITTED that the train cut off both of plaintiff's feet so that he was obviously bleeding from his ankles, and defendant was "supposed to have" first aid equipment but just happened to have none on hand; that plaintiff was put in the baggage car and "from his open wounds, his ankles, there was a pint *or more* of blood that dripped out" with nothing being done to stop plaintiff from obviously bleeding to death (R. 593-4) for ONE HOUR after the accident; that plaintiff was covered with just ONE *sheet* so that when he was brought to Truckee "He was shaking from the pain or cold. It was a *cold* night; it was VERY COLD. I (a friend of defendant's agents) took my sweater off and put it around his shoulders."

The *mere statement* of the above FACTS shows much more than "slight negligence" and holds defendants liable AS A MATTER OF LAW.

*The Law Applicable*

In *Alabama Great S. R. Co.* v. *Taylor*, 199 So. 310, 312 (Miss. 1940), the Court said: "The rule is well settled, and has been steadfastly maintained in this State, that when a passenger becomes sick or injured while en route, *no matter how free the carrier may be of blame* in respect to the sickness or *injury*, the carrier *owes the duty* to render to the passenger such reasonable care and attention as *common*

*humanity would dictate.* (Citing cases and 13 *C. J. S.*, Carriers, Sec. 754, page 1414.)

In *Dyche* v. *Vicksburg S. & P. R. Co.*, 30 So. 711, 79 Miss. 361, the *delay* of a carrier in giving aid lessened the injured *trespasser's* chance to live. It was held that the carrier had the duty of "*common humanity*" to give the injured man reasonable care and the directed verdict for the carrier was reversed. Similarly, in the *Thiel* case, the failure and delay to give any first aid and in permitting the bleeding for at least one hour favored the infection of gangrene which caused severe leg amputations which could have been prevented or lessened if proper first aid had been given. Covering the freezing plaintiff with just *one sheet* was also inhuman.

In *Casteel* v. *American Airways*, 88 S. W. 976, 980, 261 Ky. 818, it was held that the duty of care does not end on removal from the carrier but continues to provide *temporarily* for the safety of the passenger.

*Summary on Motion for Judgment*

In view of all of the above *admissions* of defendant's agents which defendant dare not and cannot dispute, it is submitted that said evidence CONCLUSIVELY shows much more than "slight negligence" on the part of defendant (1) in accepting plaintiff as a passenger and failing to give him even the slightest protection or consideration when his abnormal and crazy condition was so well known to defendant, (2) in failing to give any stop signal while plaintiff was perilously hanging out the window for at least one and a half minutes, and (3) in failing to give any first aid to plaintiff or any human consideration to stop the blood dripping from his severed ankles for at least an hour after the accident or even to cover him with a blanket.

Under procedure Rule 50(b), where a motion for directed verdict is denied, it is "deemed submitted" "subject to a later determination of the legal questions." Plaintiff set forth in his motions (R. 76), in his briefs and argued at Seattle, Wash., that the alleged defense of "contributory negligence" would not apply here in view of defendant's admitted knowledge of plaintiff's abnormal and crazy condition. In denying the motions, Judge Bowen was guided by his belief that plaintiff was guilty of "contributory negligence" as indicated by his closing remarks: "I happen to be one of those who sympathize greatly with this fine appearing young man who through this rash act, no matter what the stimulus or stimuli were that caused him to do it, *maimed himself* for life."

It is respectfully submitted that the Court thus erred and it should now be directed to set aside said verdict and judgment and to enter judgment for plaintiff.

In *Reliance Life Ins.* v. *Burgess*, 7 Cir., 112 F. (2) 234, 240 (1940, Cert. denied 311 U. S. 690), the jury verdict was for the defendant. The Circuit Court found the EVIDENCE INSUFFICIENT *to suppart the verdict* AS A MATTER OF LAW and reversed the trial Court's order denying plaintiff's motion to set aside the verdict and *directed* the trial Court to grant said motion and to enter judgment for the plaintiff.

Also see *Eastern* v. *Dickenson*, 107 (2) 116, 120 (Court); *Pessagno* v. *Euclid*, 112 F. (2) 577, 579-80 (1940, Jury); and *Montgomery Ward* v. *Duncan*, 85 L. Ed. 147, *167*.

Under the very unusual situation here where the admissions of the defendant alone clearly establish its liability, it is respectfully submitted that it is not necessary to retry the facts of this case but this Supreme Court should now direct the District Court to enter judgment in favor of the plaintiff, as requested in his motion (R. 76), after deter-

mination of the amount of plaintiff's damages which could now be ascertained.

### III to VI. Other Points Raised on the Appeal

For brevity only, petitioner is here omitting all argument on errors set forth above in the Specification of Errors, pages 36 to 39, and numbered III to VI inclusive, and also on the denial of his motion for new trial. Petitioner hereby prays for leave to file an additional brief thereon at the proper time.

### Conclusion

In view of the great importance of the matter of obtaining a jury trial by a fair and impartial group of citizens and in view of the fact that the public's interest in orderly judicial procedure is vitally affected by the malodorous situation presented here which not only affects petitioner's case but all others involving the powerful Southern Pacific Company, it is respectfully submitted that this Supreme Court should take cognizance thereof and grant certiorari so as to correct same.

Dated, San Francisco, California, August 10, 1945.

ALLEN SPIVOCK,
*Counsel for Petitioner.*

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SEP 19
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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# No. 349

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GILBERT E. THIEL,
*Petitioner,*

*vs.*

SOUTHERN PACIFIC CO., A CORPORATION,
*Respondent.*

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## PETITIONER'S REPLY BRIEF

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ALLEN SPIVACK,
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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

# No. 349

GILBERT E. THIEL,
*Petitioner,*
*vs.*
SOUTHERN PACIFIC CO., A CORPORATION,
*Respondent*

## PETITIONER'S REPLY BRIEF ON CERTIORARI

### Opinion of the Court Below

The opinion of the Circuit Court is now reported in 149 F. (2) 783.

### Preliminary

Defendant corporation's Answer to Petition for Certiorari seeks to totally *eliminate* the ADMISSIONS contained in the *testimony* of the Clerk and Jury Commissioner and also in the testimony of its *own agents* on the alleged theory that there is some "conflict" in the testimony and therefore, the decisions of the District Judge and the jury thereon are absolutely final. However, defendant Southern Pacific Co. conveniently overlooks the fact that plaintiff is relying here SOLELY upon the testimony of said Clerk and Jury Commissioner to establish CONCLUSIVELY their improper and

*illegal* jury selection methods, as they did *all* of the selecting. Similarly, plaintiff relies SOLELY upon the testimony of defendant's own agents to show CONCLUSIVELY the INSUFFICIENCY of the evidence AS A MATTER OF LAW to sustain the judgment for defendant. The defendant corporation's *whole defense* on the three issues of negligence rests upon said testimony of its own agents.

Thus, there can be no "conflict" in the evidence relied upon by plaintiff, or if there is any, it must be in the very testimony upon which defendant relies to *sustain* the judgment.

Defendant has also overlooked *Reliance Life Ins.* v. *Burgess*, 7 Cir., 112 F. (2) 234, 240 (1940 Cert. denied 311 U. S. 690), cited by petitioner on page 57, where the verdict was for defendant. The Circuit Court found the EVIDENCE INSUFFICIENT *to support the verdict* AS A MATTER OF LAW and directed the trial Court to set aside the verdict and enter judgment as requested by plaintiff's motion.

Otherwise, defendant's said Answer consists mainly of garbled versions and misstatements of the testimony in the *Record*, as will be shown.

## I. Irregularities in the Selection of Jury Preventing Fair Trial to Plaintiff

Defendant and respondent's said Answer states in Note 22 on page 9 that an "attack" was made on the "integrity of the Clerk and Jury Commissioner." Plaintiff and appellant has stated in his briefs and now repeats that the integrity or honesty of said officials is not in issue here. They merely followed the "system" of selecting mostly business people and excluding nearly all those who worked with their hands. This system is clearly improper and *illegal*. Their intentions and "motives" as set forth on pages 13 and 14 of said Answer may have been of the best

and most honorable but "the road to hell is paved with good intentions." The Jury Commissioner frankly admitted his *ignorance* of the applicable California State Code sections governing "qualifications" of jurors (R. 49), so he did not even know that only "*ordinary* intelligence" was necessary under *California Code of Civil Procedure Section 198* but selected "at LEAST 50%" from the "BUSINESS DISTRICT of San Francisco" (R. 51) on the theory that they would be of *higher* intelligence.

Said Jury Commissioner was also *ignorant* of *California Code of Civil Procedure Section 200* which lists those *exempt* as jurors but makes no mention whatsoever of daily wage earners, building trades workers or "machinists."

Defendant's said Answer on page 10 quotes from *Glasser* v. *United States*, 315 U. S. 60, 85, that "the officials charged with choosing Federal jurors may exercise *some discretion* to the end that competent jurors should be called." But defendant OMITS what immediately follows:

> "But they must *not* allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a *cross-section of the community*. Tendencies, *no matter how slight*, toward the selection of jurors by *any method* other than a process which will *insure* a trial by a *representative* group are *undermining* processes weakening the institution of jury trial, and should be *sturdily resisted*. That the MOTIVES influencing such tendencies may be of the best *must not blind us* to the dangers of allowing *any encroachment* whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties."

The Jury Commissioner *testified* that "his *duty* was merely to select a CROSS-SECTION of the people of San Francisco who might be impartial and fair jurors" (R. 48), but he says he made *no* effort to get a "CROSS-SECTION of the

people of San Francisco with regard to wealth" (R. 50). Is this permissible under "some discretion"?

Defendant contends on pages 15 and 16 that plaintiff argues for a mathematical selection of jurors to include every shade of race, religion, political thought and occupation. This is absurd. Plaintiff contends that under the above *Glasser* case the jury selection officials must at least make some *reasonable* effort to get a fair cross-section of the community which they *admittedly* and *obviously* did NOT do in this case. Said officials CAN and MUST obtain a cross-section to insure the impartial trial guaranteed under the Federal Constitution.

*In spite* of their good "motives" and "some discretion" and "ignorance" it cannot be questioned here that the jury selection methods "*generally*" used by the Clerk (R. 28) and which also "applies to the jury list" *in this case* (R. 35), and *generally* used by the Jury Commissioner and which also applies to *this case* (R. 51) show a "*systematic* and *arbitrary* EXCLUSION of *qualified* and *non-exempt* persons" which is *illegal* under the very authorities cited by defendant on pages 9 and 10 of its Answer. It is respectfully submitted that the *blanket exclusion* of "ALL the iron craft, bricklayers, carpenters and MACHINISTS" (R. 47) as jurors from *all* panels including the one in *this case*, when done "PURPOSELY" (R. 47) and where the plaintiff is a mechanic or machinist, earning a daily wage, is clearly illegal under our Constitution and the decisions of this Supreme Court. *Admittedly*, plaintiff's "CLASS" as a machinist which is "non-exempt" has been PURPOSELY EXCLUDED from ALL panels.

Furthermore, does "some discretion" permit the Clerk and Jury Commissioner to *arbitrarily exclude* ALL those earning a *daily wage* (R. 29, 31, 47) without inquiring whether they are willing to serve and without obtaining a

permissive order from the Court!. Obviously, the Court would never issue such an order as it would be highly discriminatory and illegal. Their theory that daily wage earners would not serve as jurors breaks down in *this case*, because somehow they selected Eugene Morgan who was then employed by Richmond Shipyard No. 1 which was engaged in 100% war work and he would obviously lose his higher daily wages while he served as a juror for only $4.00 per day, but yet he did *not* ask to be excused and he served on the jury. By a strange "co-incidence" said Mr. Morgan had formerly worked on the Southern Pacific's trains as a *railway* postal clerk (R. 92) and defendant Co. did not exercise its unused third peremptory challenge against him.

The frand *admission* that on ALL panels the "MAJORITY would be business people and their wives" (R. 32) with "*responsible* positions and pretty *substantial salaries*" (R. 37) is sufficient, of itself, to show systematic discrimination against the laboring or working class and particularly against the plaintiff here who was a mechanic or machinist. This Supreme Court can take judicial notice that about 75% or at least the vast majority of citizens are not "business people" with "substantial salaries." It is apparent no *cross-section* was selected.

Defendant's contention on page 15 that a cross-section without at least 50% of business people cannot be obtained is ludicrous as there were over 2,000,000 people in 9 counties to be drawn from.

Plaintiff is not relying upon his attorney's affidavit to show the illegal jury selection here but he is relying upon the plain ADMISSIONS in the *testimony* of the clerk and Jury Commissioner who did *all* of the jury selecting. It is submitted that no further legal showing is necessary here.

On page 13, said Answer says "No attention was paid to the proportion of women." Defendant overlooks the Jury

Commissioner's blunt *admission* that he has "PURPOSELY put on *more men* than women" and he even gave his own peculiar reasons for so discriminating (R. 49).

Defendant's Answer complains on page 16 that the composition of this panel was not analyzed in detail the same as the 24 actually examined at the trial. In view of the testimony of the Clerk and Jury Commissioner that their improper selection methods applied to all panels including this one (R. 28, 35, 51), it would seem unnecessary to say more. However, it is of interest that defendant does not deny the unusual preponderance of its friends among the 24 examined. Is there any doubt that these 24, drawn by lot, were a fair sample or cross-section of the rest of the panel? Counsel for defendant well knows the composition of said panel for he testified and *admitted* that he *regularly* transfers *all* personal injury cases from the State to the Federal Court where he has not lost a case in the past nine years 65-66), because he finds the Federal Court jurors are so "fair" (R. 65), and he alone finally demanded the *jury* trial in this case (R. 70-71).

It is also of interest that defendant does not deny or dispute the practically unanimous attitude of attorneys and the people of San Francisco in condemning the jury selection methods complained of here. He merely contends himself with sniping at plaintiff's counsel in note 5 on page 3 and carefully omits mentioning that the U. S. Board of Tax Appeals was *reversed* in 125 F. (2) 112, 141 A. L. R. 548.

On page 17 defendant makes a plain misstatement in saying: "Every juror who served was passed *for cause.*" The Record clearly shows that the jury was accepted only "subject to a *motion* which I will make *outside of the presence of the jury*" (R. 124). Then the plaintiff moved to strike out all twelve jurors in the box and entered a "challenge" "for cause" against all of them stating that "by

actual experience" it then appeared that there were on the jury "at *least* six jurors who are closely affiliated and connected with the Southern Pacific Co." (R. 124). Upon further examination it appeared that *10* of the jurors had business or social connections with defendant corporation (R. 88-121. See Pet. for Writ, pages 7-8). The connections were not merely as a "passenger" or "shipper" as defendant claims but meeting socially and playing golf with defendant's *officials* (R. 101-103) and receiving business from defendant's *officials* (R. 108; 115-6; 94-95) and personally acquainted with defendant's *officials* (R. 88; 98; 105; 120) and owning stock in a connected corporation (R. 107-8).

While plaintiff could not object for cause because one or maybe two jurors might be friends of some employees of defendant, he surely has a right to challenge for cause and move to strike out all 12 when at least 10 of them are admittedly so close to *officials* and employees of defendant corporation as to cast a definite doubt upon the jury's impartiality. (*Norris* v. *Alabama*, 294 U. S. 587, 589.)

## II. The Evidence Is Wholly Insufficient to Sustain the Verdict and Judgment

Since the defendant's motion to dismiss on all three issues of negligence was promptly denied by the District Judge who stated that plaintiff had presented sufficient evidence "before the Court and jury", the only question to be considered here is whether the defendant's evidence is sufficient AS A MATTER OF LAW to sustain the judgment in its favor. Plaintiff most earnestly contends that the testimony of defendant's *own* agents clearly establishes its *gross* negligence here altho "*slight* negligence" towards a *passenger* is sufficient to hold it liable. (See Pet., p. 48.) Where the facts are *admitted*, this Supreme Court is not bound by the verdict of the jury, especially where friends of defendant overwhelmingly

dominate said jury, nor is it bound by the Circuit Court's misinterpretations and *omissions* of the evidence in the Record.

The facts as they appear *solely* from the testimony of defendant's own agents are much stronger than the facts in the recent case of *Calloway* v. *Hart*, 5 Cir., 142 F. (2) 103 (1944, Cert. den. 89 L. E. 895) where there was NO *specific* notice to the carrier that the passenger was CRAZY but he merely appeared to be drunk by observation but was *accepted* as a passenger and then *not guarded*. To permit recovery above and deny same to plaintiff Thiel would be neither fair nor just.

On page 2 of said Answer defendant makes the bold assertion that the testimony of its agents showing their *full* knowledge of plaintiff's intoxicated and *crazy* condition long before his accident has been misrepresented. Plaintiff simply refers to the *Record* citations on pages 10 and 11 of his Petition for Writ of Certiorari as a complete refutation. Defendant is merely hesitant to mention the fact that its agents observed nothing when questioned on direct examination but upon *cross-examination* they *broke down* and admitted they knew plaintiff was intoxicated and *crazy*.

On page 3, said Answer states that "No one said petitioner looked drunk." Defendant's own ticket seller swore in his deposition: "Q. Did the said Gilbert E. Thiel look drunk or alcoholic. A. YES." He tried to change his testimony at the trial but his attempted perjury was exposed. Defendant's head brakeman "smelled" *liquor* from plaintiff and asked the railroad "policeman what was *wrong* with him (plaintiff)," and said policeman then told him that plaintiff was "acting CRAZY from *drinking*" and that said brakeman should "keep an eye on him". Thus,

plaintiff not only looked "drunk" but defendant's agents *knew* he was "CRAZY."

Since defendant's railroad policeman admits that he knew plaintiff was "acting CRAZY from *drink*" and his "help" was *needed* to even get plaintiff to go on the train because the man with him "was afraid" plaintiff "might try to *run away*, having done so once before", the question of plaintiff's intoxication becomes of relatively minor importance along side of his *known* "CRAZY" and *demented* condition requiring a special guard to protect him and quiet his fears for his personal safety. Such a police guard would have undoubtedly prevented the accident which defendant could have reasonably anticipated.

Defendant's railroad policeman "*smelled*" *liquor* from the man with plaintiff so obviously he was not a "competent" attendant to stay awake all night in coach seats in order to guard the crazy plaintiff. (See *Pittman* v. *Hines*, 221 S. W. 474, where the carrier was not relieved of responsibility even where the demented person had three *competent* attendants.)

On page 8, said Answer relies on two Texas cases. Defendant overlooks the *latest* Texas case of *Stewart* v. *Houston*, 229 S. W. 577, holding the carrier liable in this type of case.

Even if plaintiff could walk by himself and made no commotion, this does not relieve the carrier of responsibility where it knows or should know that the passenger is intoxicated. *Dokus* v. *Palmer*, 33 A. (2) 315, 317 (1943). Surely, more care is required when the carrier knows the passenger is CRAZY. Said *Dokus* case says: "Stepping off the train in the manner he did is the *best indication* that he was unable to take care of himself."

On page 5, said Answer misrepresents Rippetoe's testimony. He testified that several things attracted his at-

tention to plaintiff who was a stranger to him. Plaintiff asked him for a cigarette which plaintiff lit and immediately threw down without stepping on it. Plaintiff asked Rippetoe for a drink of water and when he brought it, plaintiff refused to even touch it. When plaintiff had been told by the brakeman to go into the smoker ahead, he exclaimed: "God damn it, that makes it worse."

In note 4 on page 2, said Answer says: "The conductor's testimony did not deal with petitioner, but with a hypothetical case." The conductor testified that if "Sorenson, the police officer told" him "that the plaintiff here, *Mr. Thiel*, was acting crazy from drink and that he had run away, etc.", he "would have asked" the policeman "to go along".

Plaintiff's former wife and the man with them were not called as witnesses only because they could not be found.

In note 14 on page 6, said Answer says "The conductor estimated that the petitioner was hanging out the window only "a few seconds." Defendant would have it appear that plaintiff "leaped out" the window and promptly fell to the ground before the stop signal could be given. But even defendant's citation of "Record 698-700" shows that said conductor admitted in his deposition: "I would say about a minute or a minute and a half." And later at the *trial*, he definitely answered to the question: "• • • a minute and a quarter to a minute and a half?" "A. I guess it was *all* of that from the time he went out until he dropped." Thus, even if Sherman, the brakeman, who saw plaintiff start thru the window did signal at once, the engineer *negligently* failed to stop during said one minute and a half and then when plaintiff fell to the ground, the train had to back up 600 feet which is the USUAL stopping distance at said place where the train *could* stop in "*less*

*than a minute*". Here is CONCLUSIVE proof of negligence in failing to either *signal* at once or *stop* within a minute after plaintiff first started out the window. And finally, defendant is *estopped* by its answer to plaintiff's interrogatory where it said the only signal was given "Immediately AFTER plaintiff had fallen to the ground". The jury's verdict on the above *admitted facts* is not final or binding on this Supreme Court.

In note 15 on page 6, said Answer says plaintiff "was not cold." Defendant's own witness and "friend" who helped get plaintiff off the train at Truckee described plaintiff's condition: "He was *shaking* from the pain or cold. It was a *cold* night, it was VERY COLD. I took my sweater off and put it around his shoulders." Plaintiff was covered with just ONE sheet on this freezing night. Defendant does *not* deny that plaintiff got no first aid and the blood was permitted to freely flow from his severed ankles for ONE *hour* after the accident. Such inhuman treatment constitutes negligence *as a matter of law.*

In view of the above *admissions* of defendants *own* agents, it is submitted that plaintiff's motion for directed verdict on all three issues of negligence should have been granted.

## Conclusion

The irregularities in the jury selection, especially in totally excluding plaintiff's class as a machinist from all panels require a review and correction by this Supreme Court. Defendant corporation does not even deny that all the attorneys and citizens of San Francisco have condemned said irregularities and desire a correction to remove the bad odor from the Federal Court. "It shocks the judicial instinct to allow a judgment to stand" where there is even a slight doubt about the jury's impartiality.

This Supreme Court refused plaintiff a hearing when he endeavored to proceed in the State Court because he feared said jury irregularities. It is respectfully submitted that now he should receive a hearing by this Court of *last resort* not only because he has suffered a miscarriage of justice but because all the citizens of San Francisco are likewise concerned about said jury system and want to see justice done.

Respectfully submitted,

ALLEN SPIVOCK,
*Counsel for Petitioner.*

Dated, San Francisco, California, September 17, 1945.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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# No. 349

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GILBERT E. THIEL,

*Petitioner,*

*vs.*

SOUTHERN PACIFIC CO., A CORPORATION,

*Respondent*

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## PETITIONER'S REPLY BRIEF ON MERITS

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

# No. 349

GILBERT E. THIEL,

*Petitioner,*

*vs.*

SOUTHERN PACIFIC CO., A CORPORATION,

*Respondent*

## PETITIONER'S REPLY BRIEF ON MERITS

A short reply should be made to Respondent's Brief of 101 pages received by Petitioner on March 13, 1946.

It is significant that defendant and respondent Southern Pacific Co. still makes no reply whatever to the ADMITTED *purposeful* blanket exclusion of "ALL the iron crafts, bricklayers, carpenters and *machinists*" (R. 47) which includes plaintiff and petitioner's class as a "machinist or mechanic," or to the ADMITTED *purposeful* discrimination against women as jurors (R. 49). Defendant's attempted justification for the *purposeful* exclusion of daily wage earners will be shown to be without any legal or even practical foundation.

Plaintiff will not endeavor to answer all of defendant's misstatements of the law and garbled versions of the Record as it would require a lengthy brief.

Record references to pages 1 to 141 are to the *printed* Record.

## Plaintiff's Motion to Strike Out Entire Panel

Plaintiff will confine this Reply to his Motion to Strike Out the Entire Panel, as now limited by this Supreme Court. The Motion contains 7 stated grounds (R. 10) which will be discussed in order of importance after a brief summary of the evidence taken thereon.

### The Evidence Summarized

The evidence presented by plaintiff on his said Motion (R. 9-52) stands wholly uncontradicted in the Record here. In addition to the affidavit of his counsel (R. 10), plaintiff presented in *full* corroboration thereof the testimony of the Clerk (R. 27-46) and the Jury Commissioner (R. 46-52) and also the testimony of two prominent, experienced and successful jury trial attorneys (R. 16, 23). Said affidavit covers all of said 7 grounds and gives some definite substantiation thereof (R. 11-15). It is admissible here under the rule of *Glasser* v. *U. S.*, 315 U. S. 60, 87, because it is *supported* by the following testimony:

Briefly, the Clerk testified that he selects half the jurors and the Jury Commissioner selects the other half (R. 27); that he generally selects "people who I think, from their *occupation and residence*, would be intelligent people to act as jurors" (R. 28); that if a man is listed as "a longshoreman, I do *not* put his name in" (R. 29); that all "day laborers" were "*purposely*" left out (R. 32, 44) because they might lose money (R. 30, 31); that "the number of men who might be *mechanics*, janitors, or of the labor class" "would be a small percentage" (R. 32) or "about *20%*" (R. 36); that the "*majority*" "would be business people and their wives" with "responsible positions" (R. 32); that "there would be AT LEAST 50% of *this* panel who are business men, or the wives of business men" (R. 36) "who had *responsible*

positions, and had pretty *substantial* salaries" (R. 37); that *no effort* is made to apportion jurors by districts (R. 33); that *no effort* is made to equalize the percentage of men and women as jurors (R. 32); that *no effort* is made to fairly represent different races (R. 33); that *no rules* for selecting jurors are prescribed byt he judges (R. 32); that the above procedure "applies to the list" in this case (R. 35).

The Jury Commissioner testified that his answers would "be pretty much the same as" the Clerk's (R. 46); that "AT LEAST 50% of those men selected" are "either *business* men or CONNECTED WITH SOME BIG BUSINESS concern" (R. 47); that he omits *all* "carpenters" (R. 47); that he "EXCLUDES PURPOSELY" "ALL the iron craft, bricklayers, carpenters and MACHINISTS" (R. 47); that he "definitely OMITS from the jury list" all those that "are of the *highest class* in the *labor world*" (R. 47); that he has no recollection of ever selecting a "laborer" (R. 48); that he knew his "duty was merely to select a CROSS-SECTION of the people in San Francisco who might be impartial and fair jurors" (R. 48), but he made no attempt "to get a CROSS-SECTION of people of San Francisco with regard to wealth" (R. 51); that he has "PURPOSELY put on *more men* than women" (R. 49); that he has no facilities for investigating jurors; that the Federal Judges have *not* given him "any *directions* or *rules* as to how" he "should go about selecting jurors" but "leave it *entirely* to" him (R. 49); that he is *not familiar* with the State Code sections governing selection of jurors (R. 49); that he prepares his list of names for the jury panel "in *two* or *three* days" (R. 49); that *no effort* is made to put any Negroes or Chinese on said list (R. 49); that the above method of selection was used for this case (R. 51); that "AT LEAST 50%" of the names selected are from the "BUSINESS DISTRICT of San Francisco" (R. 51).

Vincent Hallinan, a prominent jury trial lawyer of 22 years practice (R. 16) recently tried a jury case against said defendant Southern Pacific Co. and found the jury "selected almost exclusively from business executives, wealthy persons, no such thing as a workingman has appeared on the jury, or *workingmen's wives*" (R. 17); that most of them were CONNECTED in some way WITH THE S. P. CO. so that it was "*impossible* for the plaintiff in a personal injury case to obtain a verdict" (R. 17); that there were *no* "*wage earners*" on the panel (R. 18); that it was a "*typical*" Federal Court jury (R. 18); that plaintiff lost the case altho he would have won in the State Court as it was very clear for the plaintiff (R. 19); that he recently paid a penalty of $271.50 to get a dismissal of a case against the S. P. Co. to file it in the State Court (R. 20) because "the difficulty of winning these cases is KNOWN TO EVERYONE but you have a much better chance with a judge in the Federal Court than with a jury" because "the jury is *so constituted* that it seems to be *prejudiced* against cases of this kind" (R. 21); that out of a population of 635,000 in San Francisco in 1937, there were 40,000 skilled building trades workers and 60,000 laborers and skilled mechanics or a total of 100,000 hired men; that "about *three-quarters* of the population were either working people or members of their family" (R. 21, 22).

Clifton Hildebrand, a prominent jury trial lawyer of 22 years practice, recently tried a jury case against said defendant S. P. Co.; that the verdict was for the defendant altho, it being a passenger case, "ordinarily there would be no question of a recovery" (R. 23); that the jury "was a *typical* jury in this Federal Court, they were all *big business* men, contractors, insurance company executives, practically all of them from California Street or Sansome Street," the financial district, "hardly any of them from

the humble walks of life, *nor laboring people*, at all" (R. 24); that there "were no women at all"; that he "tried many cases in the Federal Court here and I do not recall of having anybody from any of the laboring class, like carpenters *or their wives*, or bricklayers, or shoe clerks, store clerks, nobody at all from any of those, no one except business executives with an occasional clerk, perhaps, from some of their offices", who was "TIED IN WITH THE S. P., or some insurance company, or a railroad" (R. 24); that he has tried about 25 personal injury cases for plaintiffs in the Federal Court (R. 24); that during the past nine years he never won a jury case (R. 25) altho he had much success with juries in the State Courts (R. 24); that he finally had to stop trying cases in the Federal Court because he represented laboring people and they could "not get a fair trial" before a jury of "big business men, insurance men and big executives"; "that the same cases that could be won in the State Court would be lost in the Federal Court"; that it is "*impossible*" to win the case in the Federal Court unless "it is just an open and shut case" but where there is any "doubt" or if the jury "can find any possible reason, they will go for the defendant, in my *experience*" (R. 25); that he is the attorney for the Building Trades Council in Alameda County and for many of the Railroad Brotherhoods; that there are about 70,000 building trades mechanics in Alameda County, 30,000 in the Central Labor Council and about 25,000 operating with different railway brotherhoods, and "with their families they constitute fully 85% of the population of some 300,000" (R. 26).

Plaintiff's counsel then stated that he was able to call more attorneys (his Affidavit mentioned *five* who recently tried jury cases against the S. P. Co. (R. 13)), but it "would be merely *cumulative* to call more attorneys," to which the Court and defendant's counsel nodded their heads in agreement (R. 52).

Then the defendant called a deputy clerk who testified that since 1940, "I can say that there were a large number (of working people), *sometimes 25%*, sometimes 35%. A great many of those however, were *excused*. I have a list of a *few* of them that did serve on the jury" (R. 55, 56); that *105* now remain on this panel (R. 56); that usually about *50%* of the jurors are "so-called *wealthier business men*" (R. 58).

Then defendant's counsel himself testified that he *regularly* transfers all personal injury cases from the State to the Federal Court (R. 65), where he has not lost a case for said defendant S. P. Co. in the past nine years, because he finds the Federal Court jurors are "very fair" (R. 66); that he "*does not know*" that "it is a common opinion among attorneys in San Francisco that it is much more difficult for a plaintiff to win a personal injury case in the Federal Court than in the State Court on the *same facts*" (R. 65).

Both parties rested and after oral argument, Judge Bowen denied plaintiff's motion to strike the panel, *bluntly* stating it was not for him as an outside Judge from Seattle to change this old "system."

## Grounds for Motion to Strike Panel

*1. Mostly Business Men Selected and Workingmen Excluded.*

From the above UNCONTRADICTED evidence if is apparent that there was *deliberate, systematic* and *intentional* discrimination in favor of big business corporations and against wage-earners or those of the labor class. This is definitely improper and illegal.

*Glasser* v. *U. S.*, 315 U. S. 60, 85 (1942).

*Mamaux* v. *U. S.*, 6 Cir., 264 Fed. 816 (1920).

*Walker* v. *U. S.*, 93 F. (2d) 383.
(Respondent's Brief, pages 27-31.)

The jury officials did not even attempt to obtain a fair *cross-section* which would be truly representative of the community and in keeping with our democratic institutions (R. 48, 51).

*Glasser* v. *U. S.*, 315 U. S. 60, 85.

The applicable state statute governing *qualifications* of jurors requires only "ORDINARY intelligence." But the jury officials judged intelligence by "occupation and residence" (R. 28) and wealth (R. 37).

California Code of Civil Procedure, Section 198.
(Respondent's Brief, Appendix, page 8.)

NONE of the building trades workers, including "machinists" (R. 47), or daily wage-earners (R. 32, 44) PURPOSELY EXCLUDED here are among the list of those *exempted* from jury service under the applicable *state statute*.

California Code of Civil Procedure, Section 200.
(Respondent's Brief, Appendix, page 9.)

28 U. S. C. A. 411 says "*same* exemptions" apply to Federal Court.
(Respondent's Brief, Appendix, page 1.)

"Passing upon applications for excuse (as jurors) is a matter *for the judge* in the exercise of *his* discretion."

*U. S.* v. *Meyer*, 113 F. (2d) 387, 395 (1940).
(Respondent's Brief, page 70.)

The court may EXCUSE *individual* jurors for good cause shown, but even the court would have no power to direct the *blanket* EXEMPTION of *all* building trades workers and *all* daily wage-earners. Neither could the court delegate such power to the jury officials. It cannot be assumed that *all* were getting big wages and *all* would refuse to serve.

(Juror Morgan, a shipyard worker earning a daily wage, served in *this* case. R. 88, 92.) Obviously, the Clerk and Jury Commissioner had no legal authority to *purposely* omit *all* these workers, as by so doing they were, in effect, adding a *new exemption* to said state statute. They admit they had no directions to do so from the court (R. 32, 49) so their conduct was wholly arbitrary.

The defendant contends that the Clerk and Jury Commissioner had discretion to leave out those who might not want to serve and it cites and relies upon *Rawlins* v. *Georgia*, 201 U. S. 638, 640. However, that case merely holds that a state statute exempting lawyers, ministers, doctors, etc., from jury service (as do most of the state statutes) is constitutional. The court said, furthermore, on page 640: "It does not even appear that any of the defendants belonged to any of the excluded classes." But *Glasser* v. *U. S.*, 315 U. S. 60, 85, sharply limits the "discretion" of said jury officials so they *cannot* make the jury "the organ of any special group or class" regardless of the fact that their "*motives* may be of the best."

The plaintiff's class as "a machinist, a mechanic," his regular "trade" as a daily wage earner (R. 642), was PURPOSELY excluded from ALL panels (R. 47).

As a practical matter, the alleged difficulty of obtaining the 105 jurors for this panel (R. 56) who would represent a fair cross-section of some 2,000,000 people within commuting distance of the court is *purely imaginary*. Surely, the winning of the war would not have been affected as not all were doing war work and the few jurors so engaged would only serve about 6 days during the 4 months period. Besides, none of the workingmen's wives were selected (R. 17, 24). Since the labor class represents at least 75% of the population (R. 21, 26), there was no *valid* excuse for not obtaining a fair, democratic representation therefrom.

The presence of more than 50% of business men on *all* panels (R. 36, 47) is so obviously out of all proportion that it proves discrimination in their favor.

The mere fact that an *illegal* jury selection system has been supinely tolerated for a long time, mainly because attorneys have been reluctant to raise the issue and have despaired of winning against the powerful influences, does not lend any validity to it as it is now being challenged for the first time.

No personal attack is being made upon the integrity of the jury officials as they merely followed the "system." The Jury Commissioner did not even know the applicable code sections controlling "qualifications" and "exemptions" (R. 49).

*2. Selection Methods Make It Impossible for Plaintiff to Win.*

The UNCONTRADICTED testimony of the two prominent attorneys who testified as expert witnesses for plaintiff shows that it was "IMPOSSIBLE" (R. 17, 25) for plaintiff to even expect to get a verdict where the jury panel is so selected as to be obviously "PREJUDICED" against personal injury cases, especially where the *S. P. Co. was the defendant* (R. 17, 24). "The difficulty of winning these cases is KNOWN TO EVERYONE" (R. 21). It is "the *common, accepted* and *definite opinion* among" attorneys (R. 13, 14). Defendant's counsel naively testified he "does not know" this (R. 65) but he offered *no evidence* to disprove it.

Defendant's counsel freely admitted that he transferred all such cases to the Federal Court where he found the jurors "very fair" and he boasted an unbroken string of victories for the S. P. Co. during the past nine years (R. 65, 66).

Plaintiff cited *Norris* v. *Alabama*, 294 U. S. 587, 589, holding that this Supreme Court will inquire whether a fair trial has been "denied in *substance and effect*" even where the jury selection appears to be fair on its face.

That plaintiff was denied a fair jury trial "in *substance and effect*" is amply demonstrated by the analysis of the 24 jurors actually examined at the trial. At least 19 or 79% were either presidents, vice-presidents or some kind of managers of large firms or independent business men or the wife of same, and all of these were in some way connected with the S. P. Co. (R. 87-123), except the wife of a civil engineer excused by defendant (R. 111, 113). At least 21 or 87.5% were *admittedly* connected in some way with the S. P. Co. (R. 87-123). Also, 5 or 20% were insurance brokers or insurance executives doing business and or meeting socially with S. P. Co. *officials* (R. 100, 102, 108, 112, 116). This is out of all proportion and proves discrimination in favor of one type of business. Incidentally, the Jury Commissioner was also an insurance broker (R. 46).

The selection of most jurors from the "downtown business district" (R. 51) where they were "connected with some *big business* concerns" (R. 47) made it INEVITABLE that most would have business or other connections with the S. P. Co. since it is the *only* railroad actually entering San Francisco.

The jury verdict in about 10 minutes (R. 78), hastened by Juror Helweisner who became foreman (R. 74), an insurance broker who admitted he played golf with S. P. Co. *officials* who were members of his club (R. 102) does not help to dispel any of the unpleasant odor surrounding this jury "system."

The two billion dollar S. P. Co. which places large and expensive ads in all the newspapers to hush up unfavorable

publicity and even to distort the facts as was done *during* the trial of this case, did not hesitate to take the fullest advantage of this *unfair* jury "system." When plaintiff tried his best to waive the jury because he despaired of ever getting a verdict from such a jury, the defendant insisted upon and *demanded* the jury trial here (R. 70-72). The poor, crippled plaintiff has been compelled to fight against such influences and almost hopeless odds.

The 7th Amendment to the United States Constitution provides that in civil cases "the right to trial by jury shall be preserved."

In *Pratt* v. *Pratt*, 74 Pac. 742, 744, 141 Cal. 247, 252, the State Supreme Court, in reversing the lower Court, said: "The trial of a case should not only be fair in fact, but it should *also appear fair*. And where the contrary appears, it SHOCKS THE JUDICIAL INSTINCT *to allow the judgment to stand*."

*3. No Apportionment by Districts.*

The Federal Statute says:

> "*Same* (Jurors); *apportioned in district*. Jurors shall be returned from *such parts of the district*, from time to time, as the *court shall direct*, so as to be *most favorable* to an *impartial trial*, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service."
>
> 28 U. S. C. A. Sec. 413.
>
> (Respondent's Brief, Appendix page 3.)

But here the Court gave no directions and prescribed no rules (R. 32, 49). It was the *duty* of the Court to "direct" apportionment in the district and this power could not be delegated to the jury officials. However, the Judges "leave it *entirely* to" them (R. 49), with the result that "AT LEAST 50%" are selected from the "BUSINESS DISTRICT of San

Francisco" (R. 51). This "business district" comprises less than one per cent of the judicial district of said Court.

*4. Discrimination Against Women as Jurors.*

The Clerk says he does "not pay any attention to the proportion" of women he selects and makes no effort to give them equal representation with men (R. 32). The Jury Commissioner goes even further and says he has "PURPOSELY put on *more men* than women" (R. 49) and gives his own arbitrary reason saying it is a "hardship" for them to serve because of their "housekeeping, motherhood, and the rest" (R. 48). This is absurd as only about 53 women would be needed from some 1,000,000, thousands of whom were unmarried, widowed or had grown children.

Just 4 or only *16%* of the 24 jurors actually examined at the trial were women and *none* of these was the wife of a workingman or of the labor class (R. 93, 95, 111, 120). The printed panel of 105 jurors in *this* case (R. 56) contained 22 women or only *21%*.

However, only the court can pass on applications for *excuse* from jury duty. *U. S.* v. *Meyer*, 113 F. (2) 387, 395. The court cannot even delegate this power to the jury officials who here, in effect, were adding a *new partial exemption* to the State Statutes which list the definite exemptions. California Code of Civil Procedure, Section 200 (Respondent's Brief, Appendix page 9).

The defendant has completely overlooked *U. S.* v. *Roemig*, 52 F. Supp. 857 (1043), holding that any discrimination against women as jurors is ground for quashing the panel. The case of *U. S.* v. *Ballard*, 35 F. Supp. 105, followed by *U. S.* v. *Chaplin*, 54 Fed. Supp. 682, and holding to the contrary should be disapproved because the Federal Court is bound *only* by the state "qualifications" which do *not* exclude women and is bound only by the state "exemptions"

which do *not* exempt women. California Code of Civil Procedure, Secs. 198, 199, 200 and 205.

Plaintiff was prejudiced by the discrimination against women as he desired a fair representation and complained about it in his Motion (R. 10) and Affidavit (R. 12) but he had only two women on the jury (R. 92, 95).

*5. Discrimination Against Other Races.*

Since plaintiff is a Caucasian, the omission of other races does not concern him so directly. However, the conduct of the jury officials in making no effort to give other races some fair representation (R. 33, 49) illustrates the indifferent, careless and illegal "system," operating with no rules or other supervision prescribed by the Court (R. 32, 49).

*6. Failure of Judges to Prescribe Rules.*

The failure of the Judges to prescribe any rules (R. 32, 49) altho they could do so under *Pointer* v. *U. S.*, 151 U. S. 396, *407*, explains the Jury Commissioner's frank admission that he did *not even know* the applicable state code sections controlling all "qualifications" and "exemptions" of jurors (R. 49).

The failure to *direct* apportionment has been mentioned above.

*7. No Prior Examination of Jurors.*

If the Judges prescribed rules and directed the mailing of questionnaires to all persons believed eligible, a fair cross-section could be obtained and those who are exempted *by statute* because of their occupation, ill health or non-citizenship could be quickly eliminated.

## Conclusion

It is respectfully submitted that the challenge to the array should have been allowed because the jury panel was not selected in conformity with law.

*Clinton* v. *Englebrecht*, 13 Wall. 343. (1872, Judgment reversed.)

The judgment should now be reversed and the District Court directed to supervise the drawing of a panel which will be a democratic cross-section and truly representative of the community. The District Court should also be directed to prescribe some fair rules to guide the jury officials, and at all events to perform its duty in directing the portions of the district from which jurors are to be returned. To avoid any suspicion of a "hand picked" jury panel, said rules should provide that the selection should be by *lot* from *all* eligible citizens as is done by rule in the State Court.

Dated, San Francisco, California, March 19, 1946.

GILBERT E. THIEL,
*Petitioner pro se,*
*% Allen Spivock,*
*1025 Russ Building,*
*San Francisco 4, Calif.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 349

GILBERT E. THIEL,
*Petitioner,*

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
*Respondent.*

## Answer to Petition for Certiorari

The petition fails to show a case within Rule 38. All that can be said is that it presents two questions of fact: (1) Whether the finding of the jury, that there was no negligence on the part of Southern Pacific Company, was correct[1] and (2) whether the finding of the District Judge,

1. The petition asserts a conflict with *Calloway v. Hart*, 146 F2d 103 (CCA 5). There is none. The *Calloway Case* held only that, on its facts, the question was for the jury. Here the question was submitted to the jury.

that there was no improper exclusion of any eligible class of persons in putting names into the box from which the petit jury panel were drawn, was correct.[2]

The petition is remarkable for three things: (1) Mis-statement of the case (a) in instances by selecting and garbling only portions of the testimony deemed favorable to petitioner[3] and (b) in other instances by affirmative mis-statement[4], (2) avowed excursions outside the record[5]

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2. The same rule, that all intendments must be made in favor of the determination of the trial court, that applies to findings of fact generally, applies to the finding on this issue. (*Thomas v. Texas*, 212 U.S. 278, 281, 53 L. ed. 512, 513.)

3 On the issue of negligence this is particularly true of the testimony of defendant's ticket agents Forsythe and Wogan, of policeman Sorenson, of the conductor Cosgrave, and of the brakeman Sherman. The treatment of their testimony is such as to misrepresent it.

The same is true of the testimony of the Clerk and the Jury Commissioner. This is dealt with below, in some detail, in justice to them.

There is too much to give the detail here.

4. Here are a few examples: Petitioner was given no opportunity to state objections to proposed instructions (petition p. 29). This is flatly contradicted by the record. (R 209, 968, 970, 972-984) "Court: Do counsel desire to take any further exceptions? Mr. Spivock (petitioner's counsel): Nothing so far as plaintiff is concerned." (R 970)

Misstatement of 28 USCA §413 (petition p. 35). It had been set out in full in Appendix A to respondent's brief in the court below.

Statements that respondent had been "informed" of petitioner's mental condition (petition 3). This is a perversion of an allegation in the answer, made on information and belief.

Petitioner did not know the train was moving when he went out the window. His own testimony shows he knew it had left Reno and was in motion. (R 677, 669; cf. 635, 636).

The conductor would not have accepted petitioner as a passenger if informed of his condition (petition 11). The conductor's testimony did not deal with petitioner, but with a hypothetical case.

Petitioner looked drunk (petition pp. 10, 14). One witness who saw petitioner on Sunday morning, over 8 hours before he jumped out the train window, said that he *then* looked like a man who

and (3) complete failure to appreciate that all questions of fact (determination of conflicts in the evidence and determination of what inferences should or should not be drawn) have been resolved by the triers of fact.

About 8:40 P.M. on Sunday, February 25, 1940, petitioner, his wife and a friend, Johnny Morris[6], boarded Train No. 9 at Reno, Nevada, to go to San Francisco. The train left about 8:50. Twenty-five minutes later, pe-

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*had* been drinking and was getting over a hang-over. (R. 734-737, 740) No one said petitioner looked drunk. In fact he was not drunk. See below.

The signal to stop the train was given only after petitioner had fallen (petition p. 12). The testimony of brakeman Sherman squarely contradicts this (R 799, 803, 810, 813, 819, 822), and was corroborated by that of passenger Buck (R 693-696).

The defendant "admitted" various things attributed to it (various places in the petition). The defendant admitted nothing of the sort. Its employees testified to the facts.

Forsythe and Wogan knew plaintiff was acting crazy (petition p. 40). Both testified they saw nothing abnormal about petitioner—he seemed normal—talked and acted coherently and rationally. (R 734-737, 740, 743, 745, 750, 751, 759, 760, 744.)

5. **Examples:**

A statement attributed to Juror Gale of his relations to Mr. McDonald, formerly president of respondent. There is no such statement in the record. There could not be. Mr. McDonald died a year before this case went to trial.

A conversation with a juror in 1944, over a year after the case was tried.

A reference of jury selection matters to the Attorney General. This follows a pattern set by the attorney for petitioner when he loses a case. Fairly recently, having lost a matter before the U. S. Tax Court, he endeavored to have the presiding member removed.

Asserted proceedings of the Central Council of Civil Clubs and San Francisco Board of Supervisors. The attorney for the petitioner (who obviously prepared the papers for petitioner's signature) should have stated his connection with the asserted proceedings—that he was a past president of this "civic club" and that he instigated and took the lead in the proceedings referred to.

A statement attributed to Judge Bowen for which there is no support in the record.

6. Neither Mrs. Thiel nor Morris was called as a witness.

titioner, without warning, "suddenly"[7] opened a window of the train and leaped[7] out, while the train was in motion.

Petitioner, his wife, and Morris had been in Reno the preceding week (R 512, 537, 642-644, 650, 651). Petitioner had been drinking and gambling. At places the record indicates that he had his last drink on Friday, the 23d, at other places that he had something to drink on the morning of Saturday, the 24th (R 512, 644-649, 651, 652, 654). It is clear that he had nothing to drink for over 24 hours before he jumped out the train window (R 651-654). There is no evidence even tending to show that he was intoxicated when he boarded the train or when he jumped.

Petitioner testified in detail to all of his actions during the week before the accident, and on the day of the accident up to the time he jumped from the train. He said he was testifying from his own recollection, not from what someone told him (R 663, 664). He claimed he had had hallucinations and was in fear of injury.[8] The evidence shows: He got up about 6:00 a.m. on the day of the accident, and walked around Reno alone, before sun-up.[9] (R 655-657). His speech was normal, coherent and rational. He was fully oriented. He appreciated and remembered the details of his surroundings, who he was with, where he was going, and that having run out of money it was necessary to get some to obtain tickets. He directed the obtaining of money by phoning to San Fran-

7. These characterizations are petitioner's. (R 20, 500.)

8. But neither he nor anyone else testified to any *fact* indicating any mental disturbance, at least up to the very moment he went out the train window. See second paragraph of note 19 below.

9. This is certainly inconsistent with a claim of being in fear of injury from gangsters.

cisco and having it wired. There was no loud talking or boisterous or unruly conduct. There was no gesticulation or commotion. His appearance and movements were normal. He required no assistance. He appreciated that he was getting on a railroad train and boarded the train willingly. He appreciated that he was on a train, and after it left Reno, that it was in motion.[10]

On the day of the accident, petitioner was observed by two ticket sellers, Forsythe and Wogan, by Sorenson, a railroad police officer, and by passenger Rippetoe, petitioner's witness.[11] There was nothing about him abnormal in appearance or conduct. He was neither "intoxicated" nor "demented" nor "crazy".

Petitioner, his wife, and Morris boarded the train together, entering the second coach. After the train left Reno, and while it was in motion, petitioner, Morris and Rippetoe went ahead to the smoker.[12] Petitioner and Morris sat together, petitioner next to the window, Morris on the aisle. Rippetoe took the seat just ahead. About 25 minutes out of Reno, the conductor came through the smoker, lifting tickets. Morris surrendered the tickets for his party. The conductor had passed on a step or two when petitioner, without warning, suddenly opened the window and jumped out, so fast that if was impossible for Rippetoe, Morris or the conductor to stop him. They did, however, manage to grab his coat and hold him mo-

10. All this appears from petitioner's own rather extended testimony, on both direct and cross examination.

11. Forsythe (R 730 et seq.), Wogan (R 740 et seq.), Sorensen (R 761 et seq.), Rippetoe (R 703-714).

12. R 500, 501, 571-574, 666, 667, 670, 706, 713-716, 795-798, 809, 816.

mentarily until he slipped from his coat.[13] The head brakeman was riding at the rear of the smoker (R 667, 794 et seq.). He immediately gave a stop signal and the train brakes were applied at once[14] (R 799, 803, 810-813, 819-822). His testimony was corroborated by that of passenger Buck (R 692-696). The conductor testified that he got hold of petitioner's coat collar and held petitioner until his coat tore and petitioner fell; that as soon as petitioner fell, he gave a stop signal, but by that time the train was already coming to a stop (R 829, 847-861, 677, 700).

Petitioner was immediately put on a stretcher, placed in the baggage car and rushed to Truckee.[15] Dr. Anderson, a physician called by petitioner, testified that if the bleeding was controlled (and it was)[16] no tourniquet was necessary (R 631), that time was better spent in getting petitioner to a doctor than in endeavoring to apply splints (R 631), and that open wounds, if they do not come in contact with anything, are better left exposed to the air than bandaged with material not known to be sterile (R 617-633). His testimony, with that of the other doc-

13. R 423, 424, 500, 501, 574, 669, 670, 691, 708, 717-721, 799, 816, 817, 826, 827, 843, 844.

14. The conductor estimated that petitioner was hanging out the window only "a few seconds". (R 43, 698-700.)

15. R 501, 593-595, 800-802, 830-832, 855-857. At Truckee petitioner was immediately given, by Dr. Bernard, Southern Pacific District Surgeon, such treatment as could be given with the means available in a little mountain hamlet, and was then rushed to the hospital at Reno. Dr. Bernard saved his life. (R 171, 172, 442, 612, 630 et seq., 786-789, 863 et seq., 873, 678, 789). All the doctors agreed that had Dr. Bernard attempted to operate at once the result probably would have been fatal. (R 437, 438, 633, 864.)

The petition has some suggestion that petitioner was not kept warm. Extra heat was put on in the baggage car. He was not cold. (R 590-592, 595.)

16. R 816, 855, 593, 867-870. Petitioner did not suffer from loss of blood. (R 441, 786, 787, 863-866, 871-873.)

tors, provide a complete negative to any claim of negligence in failing to give petitioner proper care.

What petitioner's mental condition actually was;[17] if abnormal, the nature of the abnormality[18]; whether respondent had notice of this;[19] whether respondent should have accepted petitioner as a passenger, and, if it accepted him, whether it should have provided an attendant,[20] hav-

17. There is no duty of special precaution unless the passenger is "incapable of taking care of himself" (*Welch v. Spokane etc. R. Co.*, 91 Wash. 260, 157 P. 679, 681), "in a helpless condition" (*Gates v. Bisso Ferry Co.*, 172 So. 829 (La. App.)), in a condition of "helplessness or incapacity" (*Louisville Ry. Co. v. Gregary's Adm'r*, 141 Ky. 747, 133 S.W. 805), "unable to care for himself" (*St. Louis etc. Ry. Co. v. Adams*, 163 S.W. 1029 (Tex. Civ. App.).)

18. According to petitioner he was in fear of harm by gangsters. His mental attitude, on his testimony, was of fearing harm and wanting to avoid it, not inviting it. (R 514-516, 574, 657, 663, 668, 672.) Compare *Chicago etc. Ry. Co. v. Sears*, 210 SW 684 (Tex. Com'n of App.).

19. It is not enough that there be some disability. The carrier must have actual knowledge of this before exercise of added care can be claimed. It is under no duty to examine. The doctrine of imputed or implied notice has no application. (*Fagerdahl v. North Coast T. Co.*, 178 Wash. 482, 35 P2d 46; *Watts v. Spokane etc. R. Co.*, 88 Ore. 192, 171 P. 901, 906; *S. P. Co. v. Buntin*, 54 Ariz. 180, 94 P2d 639; *Paris etc. Co. v. Robinson*, 104 Tex. 482, 140 S.W. 434, 439.)

Knowledge acquired only by the fact of accident is too late and immaterial. (*Welsh v. Spokane etc. R. Co.*, 91 Wash. 260, 157 P. 679, 681; *Dokus v. Palmer*, 130 Conn. 247, 33 A2d 315, 318.)

Knowledge of some unspecified disability is not enough to call for added care. The carrier must know the precise disability claimed, so that it can know what steps to take, before it is called on to take any. (*Fagerdahl v. North Coast T. Co.*, *supra*; *Chicago etc. Ry. Co. v. Sears*, note 18 above; *St. Louis etc. Co. v. Adams*, note 20 below; *Watts v. Spokane etc. R. Co.*, *supra*; *Welsh v. Spokane etc. R. Co.*, *supra*; *S. P. Co. v. Buntin*, *supra*; *St. Louis etc. R. Co. v. Dobyns*, 57 Okla. 643, 157 P. 735, 738.)

20. On petitioner's theory he was in fear of a non-existent threat from non-existent persons. What steps should respondent have taken to protect him from a threat which did not in fact exist, even assuming it did have notice of his mental condition? What

ing in mind, on both questions, that petitioner was accompanied by his wife and a male companion, both of whom were apparently fully able to give any care that might be necessary;[21] whether any other attendant could have prevented petitioner from going out the window when Rippetoe, Morris and the conductor could not; whether the train could have been stopped sooner and, if it could, whether any assumed delay was negligence or caused injury; and whether, in the circumstances of emergency, other steps should have been taken to care for plaintiff, although those taken saved his life; all these questions have been resolved by the jury.

The cases closest on their facts are *Chicago etc. Ry. Co. v. Sears*, 210 S.W. 684 (Tex. Com'n App.) and *St. Louis etc. Ry. Co. v. Adams*, 163 S.W. 1029 (Tex. Civ. App.). In both the passenger was unaccompanied. Both held that as **matter of law** there could be no recovery.

Shortly before the case went to trial, petitioner initiated an attack on the jury panel. Stripped of invective and

---

could it reasonably anticipate would develop from a non-existent state of facts? (Compare *Chicago etc. Ry. Co. v. Sears*, note 18 above and *St. Louis etc. Ry. Co. v. Adams*, 163 SW 1029 (Tex. Civ. App.).)

A carrier "is bound to guard only against those occurrences which can be reasonably anticipated" and a "reasonable man * * * will neither neglect what he can foresee as probable, *nor waste his anxiety on events that are barely possible*". (*Atchison etc. Co. v. Calhoun*, 213 U.S. 1, 9, 53 L. ed. 671, 675; *Kansas City So. Ry. Co. v. Pinson*, 23 F2d 247 (CCA 5).)

21. Where a passenger is accompanied by an apparently competent attendant the carrier is under no duty to displace that attendant with another. (*Gates v. Bisso Ferry Co.*, note 17 above; *Boyd v. Alabama etc. Co.*, 111 Miss. 12, 71 So. 164 and 655; *Olson v. Minn. etc. R. Co.*, 43 N.D. 371, 175 N.W. 371. Cf. *Fagerdahl v. North Coast T. Co.*, note 19 above; *So. Ry. Co. v. Hayne*, 209 Ala. 186, 95 So. 879; *Arnett v. C. & O. Ry. Co.*, 198 Ky. 742, 248 SW 1040; *L. & N. R. Co. v. Dyer*, 152 Ky. 264, 153 SW 194.)

epithet petitioner's claim comes to this: There were no "laboring" people on the jury panel.[22]

Assuming that the negro exclusion cases extend to every economic group, social class, religious sect, etc. to which a party may claim to belong, and that petitioner is a member of a class so distinct as to fall within the assumed extension of the rule, still, petitioner has not shown any impropriety in drawing the jury panel.

To make his point, petitioner must show that there had been "a systematic and arbitrary exclusion" of the class to which he belongs; an exclusion of otherwise eligible jurors "solely because of their membership in that class". (*Hale v. Kentucky*, 303 U.S. 316, 317, 82 L. ed. 1050, 1052.) He was required to show a "systematic or arbitrary exclusion of, or discrimination between," persons of a particular class. (*Wong Yim v. U. S.*, 118 F2d 667 (CCA 9, cert. den. 313 U.S. 589, 85 L. ed. 1544).) He was not entitled to have a jury made up to suit him. He had no right of *inclusion* on the panel of any particular person or classes of persons. The right is only against systematic and arbitrary *exclusion* of qualified and non-exempt persons. (*Martin v. Texas*, 200 U.S. 316, 320, 50 L. ed. 497, 499; *Thomas v. Texas*, 212 U.S. 278, 281, 53 L. ed. 512, 513; *Virginia v. Rives*, 100 U.S. 13, 25 L. ed. 667, 671; *Neal v. Delaware*, 103 U.S. 370, 394, 46 L. ed. 567, 573; *Brush v. Kentucky*, 107 U.S. 110, 117, 27 L. ed. 354, 357; *Shibuya v. Gugiro*, 140 U.S. 291, 297, 35 L. ed. 510, 513; *Franklin v. South Carolina*, 218 U.S. 161, 167; 54 L. ed. 980, 985.)[23]

22. In the court below the attack amounted to an attack on the integrity of the Clerk and Jury Commissioner.

23. *A fortiori* he is not entitled to a panel or jury made up of given proportions of persons of various classes. *Thomas v. Texas*, *Virginia v. Rives* and *Wong Yim v. U. S.*, all cited in the body and *Beckett v. U. S.*, 84 F2d 731, 732 (CCA 6).

Those charged with getting up the panel cannot anticipate every class to which litigants will claim to belong,—cannot know the make-up of litigants whose actions may not yet have been filed,—and construct a panel accordingly. For this reason, and for the reason that the rule is not one of inclusion, but is only one prohibiting arbitrary and systematic exclusion, it is a matter of no significance that on a particular panel there may be no members of a particular class. (In addition to the cases just cited see also *Ruthenberg v. United States*, 245 U.S. 480, 60 L. ed. 419; and *Beckett v. U. S.*, 84 F2d 731, 732 (CCA 6).)

If the requirements just noticed has been observed "the officials charged with choosing Federal jurors may exercise some discretion to the end that competent jurors may be called". (*Glasser v. United States*, 315 U.S. 60, 85, 86 L. ed. 680, 707; *Walker v. United States*, 93 F2d 383, 391 (CCA 8,—cert. den. 303 U.S. 644, 82 L. ed. 1103, reh'g. den. 303 U.S. 668, 82 L. ed. 1124). Cf. *Franklin v. South Carolina, supra.*)

Petitioner had the burden of showing a systematic and arbitrary exclusion of eligible talesmen solely because they belonged to a particular class. Unless violation were "expressly shown" proper selection of the panel "may be taken as sufficiently established by the presumption of regularity". (*Lewis v. United States*, 279 U.S. 63, 73, 73 L. ed. 615, 619; *Walker v. United States, supra.*)[24] And, in addition, on appeal, where the matter was heard in open court, on testimony taken, the usual rule that determina

24. Acc. *Carroll v. U. S.*, 16 F2d 951, 955 (CCA 2—cert. den. 273 U.S. 763, 71 L. ed. 880); *Needham v. U. S.*, 73 F2d 1, 2, bot. col. 2 (CCA 7—cert. den. 294 U.S. 705, 79 L. ed. 1241); *Kie v. U. S.*, 27 F. 351, 357 (C.C. Ore.).

tion of questions of fact will not be reviewed, applies, and every intendment is in favor of the ruling of the trial court. (Cf. *Thomas v. Texas, supra.*)

The claims of showing now urged are (1), an affidavit of petitioner's counsel and (2) testimony at a hearing before the trial judge, given principally by the Clerk and the Jury Commissioner.

The affidavit of petitioner's attorney must be disregarded. (1) The affidavit is inherently defective. It is only hearsay, irrelevancies and unsupported conclusions.[25] (2) Objections to the affidavit were made but were not ruled on because the affidavit was never offered in evidence[26] (R 69-138). (3) In any event affidavits cannot be used to support a challenge to the array in the absence of a stipulation. (*Glasser v. U. S.*, 315 U.S. 60, 87, 87 L. ed. 680, 708; *Martin v. Texas*, 200 U.S. 316, 50 L. ed. 497; *Smith v. Mississippi*, 162 U.S. 592, 600, 40 L. ed. 1082, 1085; *Manaux v. U. S.*, 264 F. 816 (CCA 6).) There was no stipulation.

The only testimony taken at the hearing which had any relevancy was that of the Clerk, his deputy, and the Jury Commissioner. This showed how the panel was gotten up:

From City Directories were taken the names of people who, from occupation and residence, it appears, would make intelligent jurors (R 85). With what organization or com-

25. Affidavits are subject to the usual rules of evidence. *Pandolof v. U. S.*, 286 F. 8, 20 (CCA 7—cert. den. 261 U.S. 621, 67 L. ed. 831); *Willis v. Lauridson*, 161 Cal. 106, 108, 118 P. 530; *Mason v. San-Val etc. Co.*, 1 C2d 666, 672, 36 P2d 620; *Bull v. Power Co.*, 87 N. J. Eq. 1, 99 A. 111, 114; *Union etc. Bk. v. Kolpenitsky*, 125 N. J. Eq. 125, 4 A2d 413, 415; 2 C.J.S. 987 (Affidavits, §28, a, (2)).

26. And so cannot be considered. *Melde v. Reynolds*, 120 Cal. 234, 52 P. 491.

pany they were associated did not enter into the selection (R 86), they were never selected because of occupation (R 86)[27] and no attempt was made to select business executives[28] (R 96, 97). No names of persons known to be disqualified were taken (R 105). The names endeavored to be avoided were those of people who were disqualified, exempt, or who surely would be excused by the court (R 86, 105, 106, 114).[29] Laborers, or wage earners, or working men, were not left out as a class;[30] they were taken, whatever the character of their work and whatever their occupation, if they were employed at a monthly rate or otherwise so situated that by serving they did not suffer a financial loss which they could not afford (R 87, 88, 96,

27. Occupation may be noticed as some guide to age. If a man is working as a clerk for a department store, he is probably of the right age to serve, but "that is the only way that I can recall now that the occupation would have anything to do with it" (R 86, 87). Of course, where there is a connection with a firm known to be reputable, this knowledge is not disregarded; it is assumed that a person connected with a reputable firm is a reputable person (R 97).

28. Some business executives were selected, but so were other employees of business concerns. In speaking of business men the reference was not solely to executives (R 98). See note 33 below.

29. Among the classes specified as disqualified, exempt or who would surely be excused by the court were physicians, pharmacists, railroad telegraphers, school teachers, ministers, State and Federal officials and people in such classes. Compare *Rawlins v. Georgia*, 201 U.S. 638, 50 L. ed. 899, quoted below.

30. Among the people avoided because they were always excused by the court were *certain* "laborers" or "wage earners" or "working men"; but only certain of them,—only those who worked for a *daily* wage and *for whom service would represent a severe financial loss and who, for this reason, were excused by the court* (R 87, 88, 89, 91, 110, 111). The testimony makes it abundantly clear that this statement applies only to certain working men or wage earners; to those who work at a daily wage, cannot forego the daily wage and who, for this reason, are always excused by the court (R 87, 104-106, 111). Compare *Rawlins v. Georgia* 201 U.S. 638, 50 L. ed. 899, below.

109, 110).[31] Indeed, the Commissioner testified that he had made a special effort to obtain the names of people who were members of labor unions (R 110, 111, 113).

No attention was paid to the financial status—indeed, this was not known (R 106, 107, 108, 114, 115). No attention was paid to the proportion of women, i.e., there was no attempt either to raise the proportion up or hold it down (R 91, cf. 112), and no discrimination was made among women because of their husband's occupations (R 106, 107). There have been negroes and Chinese on the panels (R 91, 92).

> "Now, has there been any purposeful exclusion of negroes or Chinese? A. No.
>
> Q. Has there been any purposeful exclusion of men who worked with their hands, just because they worked with their hands? A. Never.
>
> Q. Or any exclusion of men of small salary, whether by day, or otherwise, simply because their salaries were small?
>
> A. Never.
>
> Q. Has there ever been any exclusion of any person simply because he was poor? A. Oh, no.
>
> Q. Has there ever been any exclusion of any individual who worked at any particular trade, simply because he worked at that trade? A. No." (R 103, 104.)

> "Q. As I understand you, you paid no attention whatever to whether the prospective jurors were

31. A man was not left out who was a carpenter. He might not be a day laborer, but on a monthly wage. That he was a carpenter would not indicate that he was dependent on daily labor. A janitor would be selected. Janitors have been on juries a number of times. A man would not be left out because he was a mechanic (R 87-89). All wage earners and laboring people are not left out (R 96). If a man were listed as a laborer, he could serve if he wanted to serve (R 110).

wealthy or poor, in fact you knew nothing absolutely about their financial condition, is that correct?

A. I don't know a thing about their financial condition.

Q. And have never attempted to make any selection based on their financial standing? A. Never.

Q. And the same goes with respect to the women, you have never attempted to make any selection of women based on whether their husbands were engaged in one line of endeavor or another line of endeavor?

A. That is correct.

Q. Or whether they were rich or poor? A. That is correct.

Q. You just pick them as they come? A. Yes." (R 107, 108.)

"Q. Have you ever excluded or attempted to exclude any person or class of persons because of the nature of the work they do? A. No.

Q. Or because of the amount of pay they receive? A. No.

Q. Or because of their wealth? A. No." (R 114.)

In actual operation about 50% of the panel could be classified as business men or business people[32] (connected with or employed by[33] business concerns) and the other 50%, more or less, belonged in other classes (R 90, 91, 95, 96, 109, 115, 119, 123).[34] How a jury panel could be gotten

32. See note 28 above.

33. This would include "laboring" people employed by business concerns large and small. R 96, 109) "If you mean by that that I went out of my way to select a large number of officers of companies, if that is what you mean by an executive, I never have done that."

34. The Commissioner testified: "I have tried to keep away from the business end"; that about 50% were "connected with some business concern probably". See notes 28 and 33 above.

up without at least such a proportion of people connected in some capacity with business concerns, even large business concerns, where the court is so located that travel distance for a juror to and from the court must be within the metropolitan area of San Francisco, is not apparent.

The only persons excluded were those who were disqualified, exempt, or who surely would be excused by the Court on the ground of hardship. This practice is one expressly approved in *Rawlins v. Georgia*, 201 U.S. 638, 640, 50 L. ed. 899, 900:

> "The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act. The exclusion was not the result of race or class prejudice. It does not even appear that any of the defendants belonged to any of the excluded classes. The ground of omission, no doubt, was that pointed out by the state court—that the business of the persons omitted was such that either they would have been entitled to claim exemption, or that probably they would have been excused. Even when persons liable to jury duty under the state law are excluded, it is no ground for challenge to the array, if a sufficient number of unexceptional persons are present."

The Clerk and the Jury Commissioner proceeded in the only way they could proceed. To have a panel such as that for which appellant argues would impose the duty, neither contemplated nor possible of fulfillment, of studying every litigant to know each shading of race, religion,

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"Q: In your selection, do you omit from the jury list wage earners and laborers? A: No." (R 109.). A person listed as a labor would be selected. (R 110.).

political thought and occupation, and of then selecting like jurors. It would require a panel having every possible shade of racial background, religious faith, political conviction, financial standing, education and training, and occupation and economic endeavor. If a railroad were a party it would be necessary to have people who were not in the shipper or passenger class. And if remote "connections" disqualify, then in an action in San Francisco against the Pacific Gas & Electric Company or the Telephone Company, it would be impossible to get a jury. (But see *Roberts v. Public Service Co.*, 17 F. Supp. 63 (N.H). Cf. *U. S. v. Wood*; 299 U.S. 123, 81 L. ed. 78.)

Practical government calls for practical measures. If the measures are fairly conceived and honestly carried out no one can complain because they do not fit exactly his personal peculiarities. Congress conceived the measures and the Clerk and the Jury Commissioner fairly and honestly carried them out.

Since it is the method of selection and not the actual composition of a particular panel that is controlling, no time need be spent on this panel. But it is interesting that there was no showing that there was an exclusion from the panel in question of persons of the type petitioner claims should have been included. *The composition of this panel was not shown.* There was no evidence of it. All that appeared, as to the composition of the panel, was what appeared from the prospective jurors who happened to be called into the box for this case. This is no place to cover petitioner's misstatements in this regard. It is sufficient to call attention to the remarks of the trial judge made after the jury was impaneled (R 494) and again at

the time he denied petitioner's motion for new trial, when he made a complete and careful analysis of the jury (R 308-312). Such connection as any juror had with respondent was not shown to be more than that he or the concern with which he was connected was a passenger or shipper by railroad. *Every juror who served was passed for cause.* Every challenge for cause interposed by petitioner was sustained, some of them improperly we believe.

It is respectfully submitted that the petition should be denied.

Dated at San Francisco, California,
September 10, 1945.

ARTHUR B. DUNNE,
*Attorney for Respondent.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 349

GILBERT E. THIEL,
*Petitioner,*

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
*Respondent.*

## RESPONDENT'S BRIEF

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# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 349

GILBERT E. THIEL,
*Petitioner,*

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
*Respondent.*

## RESPONDENT'S BRIEF

### I.

### PRELIMINARY STATEMENT[1]

#### A. NATURE OF PETITIONER'S ACTION.[2]

Petitioner, a salesman,[3] his wife and a male companion, Johnny Morris, spent Sunday, February 18, 1940, to Sun-

1. Arabic numerals in parenthesis preceded by "R" refer to pages of the printed portion of the record, preceded by "f" to pages of the typewritten and unprinted portions of the record. References to the petition for certiorari, supporting brief, or reply brief, are to the typewritten copies and this is indicated by "f". Emphasis by bold face type is ours.

2. A fuller, though still summary, statement of the facts is in respondent's Answer to Petition for Certiorari, pp. 3-8.

3. The petition for certiorari says that petitioner was a machinist. His complaint alleged he was a salesman (R 5). Petitioner's occupation, and his claims of what his occupation was, are dealt with at page 62 below.

day evening, February 25, 1940, in Reno, Nevada. During that week, but not after noon of Saturday, the 24th, petitioner drank and gambled. He did not drink after noon Saturday, the 24th. He was sober at the time of the accident of this action. About 8:40 p.m., Sunday, the 25th, his wife, Morris and he, boarded respondent's Train No. 9 at Reno, to go to San Francisco, California. They sat in the second day-coach. The train left Reno about 8:50 p.m.

After the train left Reno, while it was in motion, petitioner, Morris and a fellow passenger, Rippetoe, left the second coach and went forward to the smoker, the first day-coach. In the smoker petitioner and Morris sat together, petitioner next to the window, Morris toward the aisle. Rippetoe took the seat just ahead. About 25 minutes out of Reno, the conductor came through the smoker, lifting tickets. Morris surrendered the tickets for his party. The conductor had passed on, a step or two, when petitioner, without warning, suddenly opened the window and jumped out, so fast that it was impossible for Rippetoe, Morris and the conductor to stop him. They tried. Petitioner was hurt.

Petitioner had no connection with respondent except that of a passenger. There was no relationship of employer and employee. His action was one by a passenger against a carrier for damages for personal injuries claimed by the passenger to have resulted from negligence of the carrier. His complaint shows on its face that the immediate cause of his injury was his own voluntary act.

## B. EARLIER PROCEEDINGS IN THIS CASE.

This action was commenced in the California Superior Court for San Francisco on December 30, 1940. Petitioner alleged that he "was 28 years of age * * * and was employed as a salesman and was earning about $200.00 per month;" that while a passenger "and while said train was in motion" he "suddenly opened the window of said train and leaping out" was injured (R 3-5).

Respondent removed the action into the United States District Court for the Northern District of California, Southern Division,[4] and answered. It set up appropriate defenses by denial and affirmative statement (R 5-9).

Petitioner twice moved to remand to the state court. His motions were denied. On respondent's petition attempts to proceed in the state court, in defiance of the orders of the District Court denying his motions, were enjoined.[5] On appeal the decree was affirmed. *(Thiel v. Southern Pacific Company*, 126 F.2d 710 (C.C.A. 9, 1942)). This court denied certiorari (316 U. S. 698, 86 Led. 1767).

The decision of the Circuit Court of Appeals was followed by reckless and unsupported charges of unfairness, bias or fraud against everyone. The petition for certi-

4. Before trial it was determined that the removal was proper. *(Thiel v. Southern Pacific Company*, 126 F.2d 710 C.C.A. 9, — No. 9912), cert. den. 316 U.S. 698, 86 Led. 1767, Oct. Term, 1941, No. 1206.) Since all of these proceedings are matters of record, heretofore certified to the Circuit Court of Appeals for the Ninth Circuit and to this court, the proceedings on removal, motion to remand, and enjoining further proceedings in the state court, are omitted by stipulation from the record on this appeal, and a summary statement is substituted. The stipulation provides that the earlier record can be looked to and is deemed part of this record (R 1, 2).

5. See footnote 4 above.

orari charged that the Circuit Court of Appeals ignored the merits; that its decision was the result of unfairness, bias and prejudice.[6] Denial of the petition brought an attack on the District Judge charging, without foundation, bias and prejudice.[7]

The next attack was on the clerk of the Court and the jury commissioner.[8] This gave rise to the matter here under review.

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6 The Circuit Court of Appeals was charged with a prejudicial attitude, "bias", "improper attitude", "unfair remarks and hostile attitude", depriving appellant of "a fair hearing", "closing its eyes" to the true facts and the evidence, and being "extremely technical and unfair". The petition said that "it ignored the facts and the law" and that reversal was required to insure hearing by "an unprejudiced court".

7 The supporting affidavit was so wanting in substance that it was stricken. But Judge St. Sure, although not disqualified, did not care to act further and thereafter determined only minor matters by consent.

By stipulation, the claim of disqualification, the affidavit attempting to charge bias and prejudice, and the counter affidavit, were omitted from the record. A summary statement was substituted (f 15). The stipulation, part only of which has been printed (R 1, 2), is part of this record. It provides that these papers may be looked to (f 15, 16).

8 The attack continues in the petition for certiorari and supporting brief. It is said that "the jurors were all 'hand-picked' instead of being selected by lot and 'peculiarly' they were nearly all connected with said defendant company by business, social or other ties and thus subject to influence by said defendant company" (f 2); that "the irregular jury selection methods * * * have become a *PUBLIC SCANDAL* casting a *bad odor* on the whole jury procedure in the Federal Court" (f 17) [in fact it was the same system followed for 30 years without "scandal" or "bad odor"—see below]; that "the tremendous influence of the *TWO BILLION DOLLAR* Southern Pacific Co. which had many 'friends' in other places beside the Federal jury became apparent as its vicious control over and corruption of the Federal jury system by 'subtle' methods was being exposed for the first time" (f 19); that there was no doubt "about the Southern Pacific's influence over the jury" (f 36). (Emphasis is petitioner's.)

These charges are at one with those made in appellant's brief in the court below that "the jury system has, in effect, been cor-

On March 5, 1941, petitioner filed a demand for trial by jury (R 9). On November 5, 1942, he filed a notice of motion to strike out or quash the jury panel (R 9-11), and what purported to be a supporting affidavit of his attorney (R 11-15). The motion was heard on November 9, 1942, by Judge Bowen (W. Dist. Wash. sitting in the N. Dist., Calif.), testimony was taken (R 15-68) and the motion was denied (R 68).[9] The proceedings are set out in the printed record (R 9-68). The facts are dealt with at pp. 62-75 below.

At the pre-trial conference on November 21, 1942, petitioner belatedly moved to withdraw his demand for trial by jury. The trial court emphatically stated that it preferred a jury. Respondent then refused to consent (see Fed. Rules Civ. Proc., Rule 38 (d)) and the request was denied (R 70-72).

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rupted, in favor of Southern Pacific Company" (p. 89); that the system is a "malodorous jury selection system" and "iniquitous jury methods" are used (p. 90); that "the superabundance of jurors" who have some connection with respondent "cannot be attributed to mere coincidence or chance" (p. 90).

9. The petition states that Judge Bowen denied the motion with the remark "that since a somewhat similar motion had been denied here some months before in a criminal case, it was not for him who was merely an outside judge from Seattle, Washington, to come to San Francisco and change the jury system which was being followed for so many years." (Petition, f 5. The only record reference is f 101.) There is nothing of the sort in the record (R 39, 40). In the supporting brief (f 34) it is said: "Judge Bowen bluntly stated that it was not for him as an outside judge to change a system so long in operation and denied the motion." (The only record reference is f 137.) There is no such statement in the record (R 68).

The Court did say, during the taking of testimony on petitioner's motion: "The Court will give both sides an opportunity to call such witnesses as they may wish to call" (R 39). The opportunity was given. At the conclusion of this testimony the Court said: "I wish you gentlemen to have an opportunity to argue this. I would like you to do it this afternoon" (R 68).

The next attack was on the twelve jurors selected to try the case. The case went to trial on November 24, 1942. The impanelment of the jury is set out in the printed record (R 73-131). The substance is in Appendix B to this brief. Petitioner expressly passed for cause every juror who sat except one, Julian H. Hales. He was not challenged. After peremptory challenges had been exercised or passed, and twelve jurymen had been passed for cause, the court asked "Does the plaintiff accept the jury?" Petitioner's counsel: "Yes, subject to a motion which I will make outside of the presence of the jury" (R 123, 124). The jury was sworn and the noon recess taken. When court reconvened petitioner's attorney attempted "to enter a challenge to the twelve jurors chosen to try this case," for cause "on all the grounds which have been set forth in plaintiff's previous motion to strike out the entire jury panel" and upon the further grounds that there are on the jury "at least six jurors who are closely affiliated and connected with Southern Pacific Company," and petitioner's attorney specified Mr. Gale, Mrs. Goeppner, Mr. Hohweisner, Mr. Levensaler, Mr. Knight (whom he confused with a juryman who had been excused) and Mr. Bright (R 124, 125. See App. B). After discussion (R 125-131) the motion was denied. The Court, with the advantage of having seen and heard *(again on dire)* the jurors *(State v. Lauth*, 46 Ore. 342, 80 P. 660, 662 (1905) and see pp. 42-47 below) said:

> "There not having been any challenge for cause of any juror that is here sworn to try this case * * * and believing as I firmly do, that as a matter of fact, **the plaintiff has a fair jury** to try his case—I have listened very carefully to the interrogation of jurors

by counsel on both sides; * * * and the Court has considered the business and social connection of the jurors * * * and after giving this consideration and hearing these questions asked, and hearing the answers given by the jurors, **the Court is firmly convinced that this jury is in fact a fair jury,** and the motion is denied." (R 134)

The trial proceeded[10] and defendant (respondent) had a verdict and judgment (R 74). The judge who tried the case (Hon. John C. Bowen, of Seattle, Washington) has not escaped attack for claimed unfairness.[11] It goes without saying that neither respondent's counsel nor its witnesses have been slighted.

After judgment, petitioner moved for judgment *n.o.v.*, or, in the alternative, for a new trial. The motion was heard by the District Judge, who denied the motion to

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10. Before Judge Bowen, who had heard and denied the challenge to the array.

11. It was charged that Judge Bowen agreed that counsel might have an opportunity to state objections to proposed instructions, but violated this understanding and Fed. Rules of Civ. Proc., Rule 51, and refused such an opportunity. (Petitioner's Brief below, pp. 11, 23, 97.)

The record shows: The parties rested on the afternoon of November 27, 1942 (f 903). The jury was excused until 9 o'clock the next day and it was "ordered that the attorneys appear at 8:30 o'clock A.M. on said day for hearing of the objections to the proposed instructions to the jury" (R 74). Such hearing was had. After the jury was charged, it withdrew at the court's direction and the Court invited counsel to state objections to the charge (f 968, 969). Respondent's counsel fully stated his objections (f 968, 969, 972-984). Petitioner's counsel contented himself with saying that he excepted to all instructions except eight, which he designated by number (f 968). No grounds of objection were stated. The jury returned, the Court corrected one instruction (f 969, 970), and the Court asked, "Do counsel desire to take any further exceptions? Mr. Spivok: Nothing so far as plaintiff is concerned" (f 970).

strike the jury panel and who presided on the impanelment of the jury and trial of the case. The motion was fully argued and denied (R 83, 84). The Court rendered an oral opinion. So much of it as deals with the make-up of the jury is printed in the record (R 76-83). The trial judge found that "**five jurors** whose names and occupations I have just mentioned, **belong more closely and intimately with the working man and employee class** than they do with any other class, and * * * when compared with the others, do not belong to the same occupational class as the remaining seven jurors"; that these five "I think it may be clearly supposed would be expected to be sympathetic with the experiences in life, the affairs of life, and with the economic views, of people who belong to the working or employee class." **Three** were specified who "might be termed important business men, having important or leading or outstanding business connections." Of the **remaining four**, the Court said one "was in the insurance business, but I personally did not get the impression he was in a managerial class", one was "a retired commission merchant", but it did not appear "what importance his financial standing or former business may be or may have been", and another was "a rice broker and accountant" and it was impossible from the record to state "the relative importance of his business compared with that of the so-called managerial or employer class of business." The twelfth juror, not mentioned in this oral opinion, was a housewife, Mrs. Goeppner. (See App. B.)

On appeal the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment (R 132-139; 149 F.2d 783).

The cause is here on certiorari "limited to the question whether petitioner's motion to strike the jury panel was properly denied" (R 141).

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## II.

## QUESTIONS PRESENTED

The basic question, whether the trial court erred in denying petitioner's motion to strike out or quash the jury panel, is presented by petitioner's notice of motion filed November 5, 1942 (R 9-11). Its statement of grounds presented questions of law and fact which, it is believed, resolve themselves into one only that merits discussion. The stated grounds (R 10, 11), rearranged, are:

1. The judges of the District Court failed to prescribe any rules of qualification or otherwise for selection of jurors.

2. The judges of the District Court failed to provide necessary facilities or funds for proper investigation of prospective jurors.

3. The selection of jurors "is arbitrary, because no examination whatever is made of said jurors before they are put on said panel to ascertain their qualifications or particularly their unfitness" by reason of connections with or prejudice in favor of "gigantic corporations" like respondent.

4. No effort is made to apportion jurors "by districts" [whatever that may mean].

5. By the acts of the clerk and jury commissioner "which may even appear fair on their face," respondent

has prevailed in every personal injury action for the past nine years, and by reason of that fact it will be impossible for petitioner to prevail and he will be denied trial by an impartial jury.

6. There has been class discrimination in "selecting" jurymen "on said panel" in this:

(a) A larger proportion of men are selected, thus discriminating against women.

(b) There is no effort to proportionately or fairly represent citizens of all races, thus systematically excluding Negroes and Chinese.

(c). Mostly business executives or those having the employer's viewpoint are selected, discriminating against other occupations and classes, particularly employees and poor people, plaintiff was regularly employed as a wage earner, and by consequence he is denied equal protection of the laws.

It is believed that only those grounds grouped under 6 above merit attention. These grounds tender questions both of fact and of law. The questions of fact have been resolved against the petitioner by the tribunal to which is committed the determination of such questions (p. 44 below). The only substantial questions now are: (1) Is there evidence to sustain the finding of the trial court that there was no abuse of discretion by the clerk and the jury commissioner in putting names in the jury box, and that there was no purposeful systematic, or arbitrary exclusion of any class of [illegible]ble persons solely because of membership in that [illegible]s? It will be submitted that there is such evidence. (2) Has petitioner shown that he was prejudiced by any assumed irregularity?

## III.

## STATUTES

With the exception of "qualifications" and "exemptions" the method by which petit jury panels are gotten up is fixed by Federal statutes. These are set out in Appendix A to this brief, pp. 1 to 8.

By express provision of the Federal statutes (Jud. Cod. §275, 28 U.S.C.A. §411) jurors "in the courts of the United States * * * shall have the same qualifications * * * and * * * exemptions as jurors of the highest court of law" of the state in which the Federal court is sitting. The applicable California statutes are set out in Appendix A, pp. 8 to 12.

There was a time when the Federal courts, by rule or order, if they so desired, could adopt the state practice for preparation of panels. This permissive alternative was eliminated in 1911. State statutes and state practice are now without significance except for qualifications and exemptions. (See Appendix A, pp. 1, 2, note *)

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## IV.

## SUMMARY OF ARGUMENT

The first five grounds of motion to strike the panel are wholly unsubstantial. The first four are fully answered by the plain provision of the Federal statutes. (App. A.) The fifth is immaterial. (See pp. 14-18 below.)

The sixth ground, that there was improper class discrimination by the clerk and jury commissioner in the selection of names to go into the jury box from which the panel was drawn, warrants more detailed considera-

tion, but, on such consideration, is equally unsubstantial.

The doctrine sought to be invoked is an American development of the institution of trial by jury. Its first statement was by this Court in 1880 in *Strauder v. West Virginia*, 100 U. S. 303, 25, L.ed. 664 and two companion cases. In those cases, and in every case in this Court since then, the claim of discrimination arose in a criminal proceeding. In all but two, the claim appealed to a Federal statute which was precise in terms. In the two in which it did not, there was no evidence of any discrimination. From these cases, a generalization, sufficiently broad to cover a civil case in which the claim is of discrimination against a class not defined by statute, can be made only with caution and with due regard for the rule that a judgment will not be reversed unless the appellant sustains the burden of shewing improper conduct which adversely affected his substantial rights.

If the generalization is made, these rules result: The petitioner was not entitled to a particular sort of jury. He had no right of inclusion on the panel of any person or class of persons. All to which he was entitled was a fair and impartial jury drawn from a panel from which no class of eligible persons was excluded systematically, arbitrarily and purposefully solely on account of membership in that class, and prejudice against the class. He is without ground of complaint unless he can show such exclusion was of a class determined by considerations irrelevant to the performance of jury duty and of which he was a member. Even if some class were excluded from the panel, if the exclusion was for justifiable reason,

based on capacity to act or hardship to the community, class or individual, the exclusion was proper.

The function of preparing the sort of panel to which petitioner was entitled was committed to the discretion of the clerk and jury commissioner. All that was required of them was an honest and unbiased effort to prepare such a panel. Whether they properly performed their functions was a question of fact for the trial court. It determined that question against petitioner and its finding is entitled to the same respect as the finding on any other issue of fact committed to the trial court. That finding can be set aside only if it is not supported by evidence. In determining whether the finding is supported it is to be remembered that when the conduct of the clerk and the jury commissioner was presented to the trial court, a presumption of regularity accompanied it, and petitioner had the burden of proving misconduct. Moreover, in this Court, the petitioner has the burden of showing not only misconduct, but misconduct which prejudiced his substantial rights.

In endeavoring to sustain his burden, petitioner can rely only on the showing made by the evidence *ore tenus*. His attorney's affidavit cannot be considered. The petitioner failed to show improper exclusion of any class of eligible persons, systematically, arbitrarily, purposefully or otherwise. He failed to show any prejudice by any assumed exclusion. He failed to show that he was a member of any assumedly excluded class. He failed to show that any assumed exclusion of any class was the result of class prejudice. He failed to show that any persons excluded were such as to make them act differently from

those who were drawn and failed to show that a sufficient number of unexceptional persons were not present.

If it be assumed that the rule developed in the criminal cases is to be extended to cover civil cases, this case is controlled by *Rawlins v. Georgia*, 201 U. S. 638, 50 L.ed. 899 (1906).

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## V.

## ARGUMENT

### A. THE FIRST FIVE GROUNDS OF THE MOTION TO STRIKE THE JURY PANEL (AS WE ARRANGE THEM ABOVE) ARE UNSUBSTANTIAL.

**The first ground** of motion is that the judges of the District Court failed to prescribe "any rules of qualification or otherwise for selection" of jury panels. District judges are neither required nor permitted to prescribe such rules. Congress has done this. (See App. A, pp. 1-8) The qualifications of jurors are those for "jurors of the highest court of law" of the state in which the District Court is sitting. (Jud. Cod. §275, 28 U.S.C.A. §411, App. A, p. 1) The other rules "for selection" of names for the jury panel,—the machinery for putting names into a jury box which shall contain not less than 300 names from which the panel shall be drawn by lot,—have been directly prescribed by Congress itself. The names are to be placed in a box by the clerk of the District Court, or a duly qualified deputy clerk, and a commissioner to be appointed by the senior District Judge. (Jud. Cod. §276, 28 U.S.C.A. §412, App. A, pp. 1-3) Determination of names to go into the jury box is committed to the discretion of the clerk and jury commissioner. (See p. 38 et seq. below.)

**The second ground** is that the District Judges failed to provide "necessary facilities or funds to permit proper investigation of prospective jurors." The statutes neither require nor authorize District Judges to provide "facilities or funds." Evidently petitioner had in mind "facilities and funds" to permit the clerk and jury commissioner to make investigations. If such facilities and funds are to be provided, Congress must do it. At present neither the clerk nor the jury commissioner is required to make such investigation. This investigation is made by the court itself, after the names have been drawn and the prospective jurors have been summoned by the marshal. Compare the testimony of Mr. Calbraith, then deputy clerk (R 52-59, esp. 52, 53, 55), and of the clerk, Mr. Maling (R 38, 39). Not only is there no requirement of examination for qualifications before the names are drawn from the box, but the determination of qualifications is a judicial matter. It is a function of the court. The function of the clerk and jury commissioner is to submit names to the court (by putting them into the box for drawing), for testing by the court.[12]

This disposes of the **third ground**, that there was no examination of prospective jurors "before they are put on said panel to ascertain their qualifications." No such examination by the clerk or jury commissioner is contemplated by the statute. There was in fact such an examination by the Court before the names were "put on said panel." Indeed, the statute does not require examination even by the court before the names are put on the panel.

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12. No process is provided for the clerk or jury commissioner, —they have no power of subpoena. (See *United States v. Rondeau*, 16 F. 109, 111 (C.C. La. 1883).)

Examination, as a matter of practice, could be postponed until impanelment of a jury for a particular case. It can be done then. One of the purposes of the voir dire is to examine qualifications.[13]

*Reynolds v. United States*, 98 U.S. 145, 25 L.ed 244 (1879);

*State v. Lloyd*, 138 Wash. 8, 244 Pac. 130 (1926).

**The fourth ground** is that there was no effort to apportion jurors by districts. Evidently what was meant was that there was no effort to draw the prospective jurors from the whole of the Northern District of California. There was no such requirement.[15] The statute (Jud. Cod. §277, 28 U.S.C.A. §413, App. A, pp. 3, 4) is explicit. "Jurors shall be returned from such parts of the district * * * as the court shall direct * * * so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district."[16] The Court can "draw and summon

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13. Compare the statutory provision for returning "jurymen from the bystanders" when the panel is exhausted (Jud. Cod. §280, 28 U.S.C.A., §417, App. A, p. 6). There can be no examination until the name of such prospective juror is called on impanelment of the petit jury.

14. Compare note 41 below. See *Vega v. Evans*, 128 Ohio St. 535, 191 N.E. 757, syl. 1, by the Court (1934); *Sherman v. William M. Ryan & Sons*, 126 Conn. 574, 13 A.2d 134 (1940).

15. Even the provisions of Cal. C.C.P., §206 (which do not apply in the Federal court), that names shall be selected from different wards or townships in proportion to population, "is directory only." (*People v. Tenant*, 32 C.A.2d 1, 8, 88 P.2d 907 (1939,—hr. by Supreme Ct. den. 1939). Cf. *People v. Corder*, 306 Ill. 264, 137 N.E. 845, 849 (1922).)

16. Without express statutory provision it would be proper to restrict those summoned to persons residing within convenient travel distance of court. (*People v. Patterson*, 58 C.A.2d 837, 843, 138 P.2d 341 (1943); *Blakey v. Commonwealth*, 182 Va. 614,

jurors from the entire district" but "it was not necessary, however, that this be done." (*Lewis v. United States*, 279 U. S. 63, 72, 73 L.ed. 615, 619 (1929). Acc., *Agnew v. United States*, 165 U. S. 36, 42, 41 L.ed. 624, 626 (1897);[17] *Rathenberg v. United States*, 245 U. S. 480, 482, 62 L.ed. 414, 418 (1918).[18])[19]

The Northern District of California extends from San Luis Obispo to the Oregon line (655 railroad miles) and from the Pacific Ocean to the Nevada line (229 railroad miles). Selection of jurors to sit in San Francisco was necessarily limited to those within travel distance, commuting distance,—of San Francisco. The evidence shows that on instructions from the Court, the clerk and jury commissioner restricted names put in the jury box to those of people who lived within commuting distance of the court, but that within this area, there was no discrimination against any locality (R 34, 41, 46, 50).[20]

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29 S.E.2d 863, 865 (1944). Compare the remarks of District Judge Knox, chairman of the committee of District Judges appointed to study the problem of obtaining proper jurors, to the Denver Bar Association, 21 *Dicta* 283, 287 (1944), his committee's report to the Judicial Conference (Sept. 1942), and the testimony before the House Judiciary Committee on June 12 and 13, 1945, on hearings on H.R. 3379, 3380, 3381.

17. The court ordered a special venire to issue for ten grand jurors to be drawn, all to come from a single county within the district.

18. The court rejected any argument like petitioner's; said the argument disregarded the plain language of Amendment VI, the contemporary construction put on it by the Judiciary Act of 1789 "and the continuous legislative and judicial practice from the beginning."

19. For cases from lower Federal courts, see App. A, p. 3, note 6. See, also, note 74, below.

20. The clerk testified that he paid no attention to the part of the district from which the jurymen came (R 34);—and, of course, he then could not, and did not, discriminate against any part of the district,—except that on instructions from the Court,

**The fifth ground** is that respondent prevailed in every personal injury case tried by jury in the Federal court in the last nine years. The fact is immaterial. There was no claim, nor was there any attempt to show, nor was there any evidence remotely tending to show, that these cases were won because of any improper conduct, any improper influence with the juries, any connection with the selection or method of selection of names for the jury panel, or any bias on the part of jurors. The trial court put its finger on the explanation when counsel for respondent was testifying: "The Court: Q: Did you ever settle a case? A: A great many" (R 66, 67).

### B. THERE WAS NO IMPROPER EXCLUSION OF ANY CLASS OF ELIGIBLE PERSON.

The last ground of motion is that there was an improper discrimination against classes of eligible persons by the clerk and jury commissioner in selecting names for the jury box. To frame properly the question and point the discussion it seems advisable first to deal with some legal considerations involved.

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he did not go beyond San Jose on the one hand and San Rafael on the other (R 41); that he did not endeavor to work out exact mathematical percentages for each precinct within travel distance of San Francisco, but that he never purposely excluded any resident of any city or town or part of a city or town (R 41).

The jury commissioner testified that his practice was like the clerk's (R 46); that he never purposely excluded any area in San Francisco or its vicinity or in the district within travel distance of the Court; that he endeavored to get people who were within traveling distance of the Court (R 59).

Compare note 15 above.

**I. Development of the General Principle That in Preparing Jury Lists Class Prejudice Shall Not Be Permitted to Work a Systematic and Purposeful Discrimination Against Any Class of Eligible Person.**

We assume for the moment that the principles and rules of the decisions in criminal cases dealing with claims of purposeful discrimination against negroes, by excluding them from jury lists because of "race or color,"[21] are to be applied in civil cases and extended to classes beyond the class for whose protection the 13th, 14th, and 15th Amendments were primarily designed,[22] and beyond those

21. The cases in this Court dealing with claims of exclusion of qualified and non-exempt persons from jury lists because they were members of a class, are criminal cases and cases dealing with claimed exclusion of colored citizens, except four: (1) *Jugiro v. Brush*, 140 U.S. 291, 35 L.ed. 510 (1891), where an alien Jap claimed exclusion of his race, which, if made out in fact, would have been a violation of the Act of March 1, 1875 (8 U.S.C.A. §44), which applies to State and Federal agencies and prohibits discrimination "on account of race, color, or previous condition of servitude"; (2) *Rawlins v. Georgia*, 201 U.S. 638, 50 L.ed. 899 (1906), where objection was made to occupational exclusions; (3) *Ruthenberg v. United States*, 245 U.S. 480, 62 L.ed. 414 (1918), where the claim was exclusion in a Federal court of a class determined by political affiliations which, if made out, was a violation of the Act of June 30, 1879, as amended, and carried into the Judicial Code, §276 (28 U.S.C.A. §412, App. A, p. 3); (4) *Glasser v. United States*, 315 U.S. 60, 86 L.ed. 680 (1942), where the claim was of improper exclusion of women and selection of women from the membership of a private organization.

22. In *Gibson v. Missouri*, 162 U.S. 565, 580, 40 L.ed. 1075, 1078, this Court cited the earlier cases dealing with the exclusion of negroes, the Act of March 1, 1875 (App. A, p. 4), and the removal statute, R.S. §641, and said: "The cases cited were held to have decided that the statutory enactments referred to were Constitutional exertions of power of Congress to enact appropriate legislation for the enforcement of the provisions of the 14th Amendment which was designed, primarily, to secure the colored race, thereby invested with the rights, privileges and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons; * * *." The rest of the passage is quoted at p. 25 below.

classes specified in Federal statutes.[23] The main body of principles and rules dealing with claims of improper exclusion from jury lists was worked out in five cases decided from 1880 to 1883:

*Strauder v. West Virginia*, 100 U.S. 303, 25 L.ed. 664 (1880);

*Virginia v. Rives*, 100 U.S. 313, 25 L.ed. 667 (1880);

*Ex Parte Virginia*, 100 U.S. 339, 25 L.ed. 676 (1880);

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23. We are not here concerned with the special statutes disqualifying jurors who have served within a year and certain persons in bigamy and related cases, and exempting workers in United States Arsenals. Passing these there are four Federal statutes having bearing.

Judicial Code, §275 (28 U.S.C.A., §411) refers the general "qualifications" and "exemptions" of jurors to state law providing that for jurors in courts of the United States they shall be the same as for jurors for the highest court of law in the state.

Section 4 of the Act of March 1, 1875, 8 U.S.C.A., §44, provides that no citizen shall be disqualified for jury service "in any court of the United States, or of any state on account of race, color, or previous condition of servitude." Judicial Code, §278, 28 U.S.C.A., §415, is to the same effect, but is restricted in operation to courts of the United States.

Judicial Code, §276, 28 U.S.C.A., §412, provides that the clerk and jury commissioner shall place names in the jury box "without reference to party affiliations." This provision originated in the Act of June 30, 1879.

For the history of the statutes see App. A, pp. 4, 5, note 7.

Before 1875 there is no reference in any Federal statute (as to state statutes see App. A, p. 5, note 7), nor, so far as we are aware, is there any Federal decision (certainly none of this Court), touching on exclusion of general classes from jury service. The first statute expressly referring to jurors is the Act of March 1, 1875 (see App. A, pp. 4, 5, note 7), which applies to both state and Federal courts and deals only with classification on the basis of "race, color, or previous conditions of servitude." The first reference to party affiliation as a possible line that might be drawn in making arbitrary exclusions, is in the Act of June 30, 1879, c. 52, §2, 21 Stat. 43 (Jud. Cod., §276, 28 U.S.C.A., §412, App. A, p. 3). There are no decisions of this Court dealing with any claimed exclusion to which one or the other of these statutes did not apply except *Rawlins v. Georgia*, 201 U.S. 638, 50 L.ed. 899 (1906) and *Glasser v. United States*, 315 U.S. 60, 86 L.ed. 680 (1942). See note 21 above and p. 54 et seq. below.

*Neal v. Delaware*, 103 U.S. 370, 26 L.ed. 567 (1881);
*Bush v. Kentucky*, 103 U.S. 110, 27 L.ed. 354 (1883).

The *Strauder Case* held that a statute restricting jurors to "white male persons" denied to a negro "equal protection of the laws" in violation of the 14th Amendment, and that it was error to deny a petition to remove under R. S. §641 and a motion to quash the venire.[24]

In the *Rives Case mandamus* required remand of prisoners to the state court because the state **statute** providing for jury service by "all male citizens" did not deny to the prisoners any civil rights and discrimination by state **officers**, in getting up jury panels, did not warrant removal under R. S. §641.[25]

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24. The Court states the question to be whether the defendant was entitled to "a jury selected and empanelled without discrimination against his race or color, because of race or color"; **not** whether he was entitled to have the jury "composed in whole or in part of persons of his own race or color" but "whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that **by no possibility** can any colored man sit upon the jury." In the course of the opinion it was said that the whole idea of a jury is that of "persons having the same **legal** *status* in society as" the defendant. The case is turned on the 14th Amendment. The Civil Rights Bill of April 9, 1866, is quoted as a partial enumeration of the rights and immunities intended to be guaranteed by the Constitution. No reference is made to §4 of the Civil Rights Act of March 1, 1875, but it is referred to in the other cases decided the **same day**.

25. It was said that if the officer charged with the selection of persons from whom the juries would be drawn "confined his selection to white persons, and refused to select any persons of the colored race, solely because of their color, his action was a gross violation of the spirit of the state law, as well as of the Act of Congress of March 1, 1875, 18 Stat. at L., 335, which prohibits and punishes such discrimination," but that assertions that the grand and petit juries "were composed wholly of the white race" and that members of the colored race had never been allowed to serve "fall short of showing that any civil right was denied,

In *Ex Parte Virginia, habeas corpus* was denied to a state officer indicted for violation of §4 of the Act of Mar. 1, 1875 (8 U.S.C.A. §44, App. A, p. 4)[26] by excluding colored citizens from the jury lists on account of their race, color, and previous condition of servitude. The statute so applied was sustained.[27]

The *Neal Case* held that removal to the Federal court for exclusion of colored citizens from the jury list was properly denied, because though the Delaware statutes excluded them those statutes were repealed by the amend-

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or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected." Defendants had asked for inclusion of a definite proportion of Negroes, one-third. "The privilege for which they moved and which they also asked from the prosecution was not a right given or secured to them or to any person, by the law of the State, or by any Act of Congress, or by the 14th Amendment of the Constitution. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which is asserted was denied to the petitioners by the state court, viz.: a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any Federal statute."

For a review of the cases on the right to remove see *Kentucky v. Powers*, 201 U.S. 1, 50 L.ed. 633 (1906).

26. For the history of the Federal statutes see App. A, p. 4, note 7.

27. The purposes of the 14th Amendment are pointed out and it is said that "power was given to Congress to *enforce* its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract things denominated State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured. Such is the Act of March 1, 1875, 18 Stat. at L. 336, and we think it was fully authorized by the Constitution."

ments to the Constitution and the Act of March 1, 1875.[28] The conviction was reversed, however, for improper denial of challenges to juries drawn from lists from which state officials had systematically and intentionally excluded all colored citizens.[29]

The *Bush Case* reversed a conviction because the grand jury was organized under a Kentucky statute, adopted after the 14th Amendment, which restricted jurors to "white citizens," and was organized before the holding in *Commonwealth v. Johnson*, 78 Ky. 511, that the limiting word "white" was improper. The petit jury was not subject to the same attack, however, and a motion to set aside the panel of petit jurors was properly denied, although there were no members of the defendant's race on the panel.[30]

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28. The Court quotes from the Civil Rights Bill of April 9, 1866 and §4 of the Civil Rights Act of March 1, 1875 and states that in the three decisions of 1880, the constitutionality of these statutes was sustained. It then uses substantially the language quoted from *Gibson v. Mississippi* below at p. 25.

29. Although the questions could not be raised on petition for removal, they could be reviewed on writ of error. The Court said, referring to *Virginia v. Rives*, note 25 above: "We repeat what was said in that case, that while a colored citizen, party to a trial involving his life, liberty or property, cannot claim, as matter of right that his race shall have a representation on the jury, and while a mixed jury in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, 'That in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race and no discrimination against them, because of their color.' So that we need only inquire whether, upon the showing made by the accused, the court erred in overruling the motions to quash the indictment and the panels of jurors." See this quoted with approval in *Wood v. Brush*, 140 U.S. 278, 285, 35 L.ed. 505, 508 (1891).

30. The order to the sheriff to summon the petit jury directed him to "proceed in his selection without regard to race, color or

The result of these cases was summarized by this Court in 1896[31] in *Gibson v. Mississippi*, 162 U.S. 565, 40 L.ed. 1075.[32] The earlier cases and the Act of March 1, 1875 (8 U.S.C.A. §44) are referred to. It is said that the cases decided that the statute was enacted under power to enforce the 14th Amendment "which was designed primarily, to secure to the colored race, thereby invested with the rights, privileges and responsibility of citizenship," the enjoyment of civil rights enjoyed by white persons[33] and the court adds

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previous condition of servitude." The motion to set aside the petit jury panel was properly overruled "for the reason, amongst others, that the grounds upon which it was rested do not clearly and distinctly show that the officers who selected and summoned the petit jurors excluded from the panel qualified citizens of African descent *because of their race or color*." It may be that only white citizens were selected, but it would not follow that the officer violated the law and special instructions. (See note 64 below.) "There was no legal right in the accused, to a jury composed in part of his own race. All that he could rightfully demand was a jury from which his race was not excluded *because of their color*. *Virginia v. Rives*, supra. The allegation, that colored citizens were excluded and that only white citizens were selected, was too vague and indefinite to constitute the basis of an inquiry by the court whether the sheriff had not disobeyed its order by summoning and selecting jurors with intent to discriminate against the race of the accused." (Italics those of the Court.)

31. Two intervening decisions, affirming convictions and holding that there was no improper exclusion because of race or color, add nothing to the statement of the doctrine. *Wood v. Brush*, 140 U.S. 278, 35 L.ed. 505 (1891), states the doctrine by quotation from *Neal v. Delaware*, supra and *Jugiro v. Brush*, 140 U.S. 291, 35 L.ed. 510 (1891), holds that the objections "are substantially disposed of by the decision in *Wood v. Brush*, just rendered."

32. Followed in *Smith v. Mississippi*, 162 U.S. 592, 40 L.ed. 1082 (1896) and *Murray v. Louisiana*, 163 U.S. 101, 41 L.ed. 87 (1896), affirming convictions and holding petitions for removal were properly denied.

33. See note 22 above for the language of the Court.

"that while a state, consistently with the purposes for which the amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications, and while a mixed jury in a particular case is not, within the meaning of the Constitution, always or absolutely necessary to the enjoyment of the equal protection of the laws, and therefore an accused, being of the colored race, cannot claim as matter of right that his race shall be represented on the jury, yet[34] a denial to citizens of the African race, *because of their color*, of the right or privilege accorded to white citizens of participating as jurors in the administration of justice would be a discrimination against the former inconsistent with the amendment and within the power of Congress, by appropriate legislation, to prevent: that to compel a colored man to submit to a trial before a jury drawn from a panel from which were excluded, *because of their color*, men of his race, however well qualified by education and character to discharge the functions of jurors, was a denial of the equal protection of the laws: and that such exclusion of the black race from juries because of their color was not less forbidden by law than would be the exclusion from juries, in states where the blacks have the majority, of the white race because of *their* color." (Italics by the Court.)

Later cases have added little and have hardly varied the form of expression. *Carter v. Texas*, 177 U.S. 442,

34. The language in this quotation comes from *Neal v. Delaware* (see note 28 above) with the addition of the language beginning "and while a mixed jury" and ending with the footnote reference for this footnote.

44 L.ed. 839 (1900), citing the *Strauder*, *Neal* and *Gibson Cases*, stated the rule that equal protection of the laws was denied a colored defendant where "all persons of the African race were excluded, solely because of [illegible] race or color." Its statement was adopted by quotation in *Norris v. Alabama*, 294 U.S. 587, 79 L.ed. 1074 (1935), the court adding that "this statement was repeated in the same terms in *Rogers v. Alabama*, 192 U.S. 226, 231, 48 L.ed. 417, 419, 24 S.Ct. 257,[35] and again in *Martin v. Texas*, 200 U.S. 316, 319, 50 L.ed. 497, 498, 26 S.Ct. 338."[36]

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35. *Franklin v. South Carolina*, 218 U.S. 161, 167, 54 L.ed. 980, 985 (1910), said the appropriate rule is that laid down in *Carter* and *Rogers Cases* and held that there was no improper discrimination within the rule of those cases.

36. The *Martin Case* held that the claim made was not made out for want of proof; that a different conclusion in this case would mean that "an allegation of discrimination against the African race because of their race could be established by simply proving that no one of that race was on the grand jury that returned the indictment, or on the petit jury that tried the accused, whereas a mixed jury, some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case; nor is a jury of that character guaranteed by the 14th Amendment. What an accused is entitled to demand, under the Constitution of the United States, is, that, in organizing the grand jury as well as in the impaneling of the petit jury, there shall be no exclusion of his race and no discrimination against them, because of their race or color."

The *Martin Case* is quoted and followed in *Thomas v. Texas*, 212 U.S. 278, 282, 53 L.ed. 512, 514 (1909) and the Court quoted from the opinion of the court below to the effect that want of full *pro rata* representation would not be evidence of discrimination and that there was no violation of the Constitution if the jury commissioners "fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in their selection of the jury lists."

The *Martin Case* and the *Thomas Case* were cited and applied in *Ruthenberg v. United States*, 245 U.S. 480, 482, 62 L.ed. 414, 418 (1918), a case coming up from a United States District Court, where it was said that these cases demonstrated "the want of merit in the proposition that constitutional or statutory rights were denied the plaintiffs in error, who were Socialists, because the grand and trial juries were composed exclusively of members of other political parties and of property owners."

*Hale v. Kentucky*, 303 U.S. 613, 616, 82 Led. 1050, 1052 (1938), reversed a conviction because the uncontroverted proof showed "a systematic and arbitrary exclusion of negroes from the jury lists solely because of their race and color." *Smith v. Texas*, 311 U.S. 128, 129, 85 Led. 84, 86 (1940) uses the expressions "intentionally and systematically excluded from grand jury service solely on account of their race and color."[37] *Glasser v. United States*, 315 U.S. 60, 86, 86 Led. 680, 707 (1942) reh. den. 315 U.S. 827, 86 Led. 1222, in a dictum, condemned "deliberate selection of jurors from the membership of particular private organizations."[38] *Hill v. Texas*, 316 U.S. 400, 86 Led. 1559 (1942) speaks of the problem as one "of racial discrimination," and rests heavily on *Neal v. Delaware* and §4 of the Civil Rights Act of March 1, 1875 (8 U.S.C.A. §44). In the last decision, *Akins v. Texas*, Oct. Term, 1944, No. 853 U.S. , 89 Led. (Adv. Op.) 1296, 65 Sup. Ct. Rep. 1279 (1945), the court uses the language "arbitrary and purposeful limitation," "purposeful discrimination," "deliberately and intentionally limited," and says that "a purpose to discriminate must be present."

With these cases in mind, the applicable general principles and rules are not difficult of statement:

The 7th Amendment guarantees to litigants in Federal courts "the basic institution of jury trial in only its

37. The Court holds that "racial discrimination" violates the Constitution "and the laws enacted under it" and for this last quotes in a note §4 of the Civil Rights Act of March 1, 1875 (8 U.S.C.A. §44).

38. The actual holding was that the claim of improper selection was not made out.

most fundamental elements", (*Galloway v. United States*, 319 U.S. 372, 390, 87 L.ed. 1458, 1471 (1943), reh. den. 320 U.S. 214, 87 L.ed. 1851; *United States v. Wood*, 299 U.S. 123, 81 L.ed. 78 (1936) reh. den. 299 U.S. 624, 81 L.ed. 459), as those elements were developed at the common law (*Capital Traction Co. v. Hof*, 174 U.S. 1, 43 L.ed. 873 (1899); *Thompson v. Utah*, 170 U.S. 343, 42 L.ed. 1061 (1898)), with liberty to adjust details to make them congenial to the environment (*Galloway* and *Wood Cases*; *State v. Mercier*, 98 Vt. 368, 127 A. 715 (1925)). The procedure developed was "not to enable the" party "to select jurors, but to secure an impartial jury." The Constitutional right was maintained, and a party had no cause of complaint if his case was tried by a fair and impartial jury. (*Brown v. New Jersey*, 175 U.S. 172, 175, 44 L.ed. 119, 121;[39] *Howard v. Kentucky*, 200 U.S. 164, 50 L.ed. 425 (1906); *Ex parte Spies*, 123 U.S. 131, 168, 31 L.ed. 80, 87 (1887); *Virginia v. Rives*, note 25 above.)[40] He had such a jury if it was drawn from a list so selected that the list could be said to be fairly representative of the com-

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39. This case held that in a prosecution for murder the jury might be selected from a special list,—might be a so-called "struck jury."

40. The Court said in *People v. Parman*, 14 C.2d 17, 92 P.2d 387 (1939), quoting from *People v. Shannon*, 203 Cal. 139, 142, 263 Pac. 522 (1928), which in turn relied on *Brown v. New Jersey*, supra: "Assuming, however, that the point is properly before us, there is nothing in the state or Federal constitutions, or any statute, which guarantees one accused of a crime a trial by a jury composed of men and women or of only men or of only women or of any definite proportion of either sex. His right is to a fair and impartial jury, and not to a jury composed of any particular individuals. He cannot complain if he is tried by an impartial jury, and can demand nothing more."

munity[41] (*Glasser v. United States*, 315 U.S. 60, 86 L.ed. 680 reh. den. 315 U.S. 827, 86 L.ed. 1222 (1942); *Smith v. Texas*, 311 U.S. 128, 85 L.ed. 84 (1940)). It was representative of the community,[42] even if some classes were excluded, provided "the exclusion was not the result of race or class prejudice," the persons excluded were not such as "to make them act otherwise than those who were drawn would act" and "a sufficient number of unexceptional persons were present."[43] (*Ballins v.*

41. Against bias or other disqualification of a particular juryman he was protected by challenge to the polls. *Aldridge v. United States*, 283 U.S. 308, 75 L.ed. 1054 (1931—class prejudice is a proper matter for inquiry on the voir dire examination); *United States v. Wood*, 299 U.S. 123, 81 L.ed. 78 (1936), reh. den. 299 U.S. 624, 81 L.ed. 459; *State v. Brooks*, 57 Mont. 480, 188 P. 942 (1920—prejudice against I.W.W.). See note 14 above and cases in the body at that point.

42. And "community" must be understood to mean only those "citizens" of proper age who have their "natural faculties" and "ordinary intelligence," are "not decrepit," are "of **fair character** and **approved integrity**, and of **sound judgment**" and have not been "convicted of malfeasance in office or any felony or other high crime." (Cal. C.C.P. §§198, 199, 205; App. A, p. 8 et seq.)

43. In *United States v. Wood*, above, this Court said: "**Impartiality is not a technical conception. It is a state of mind.** For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. State courts enforcing similar requirements of state constitutions as to trial by jury have held that the legislatures enjoy a reasonable freedom in establishing qualifications for jury service, although these involve a departure from common-law rules. This principle was thus stated by the Court of Appeals of New York in *Stokes v. People*, 53 N.Y. 164, 173, 13 Am. Rep. 492: 'While the Constitution secures the right of trial by an impartial jury, the mode of procuring and impanelling such jury is regulated by law, either common or statutory, principally the latter, and it is within the power of the legislature to make, from time to time, such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury.'" *Brown v. State*, 62 N.J.L. 666, 678, 42 A. 811, is quoted to like effect.

*Georgia*, 201 U.S. 638, 640, 50 L.ed. 899, 900 (1906); *People v. Prior*, 294 N.Y. 405, 63 N.E. 2d 8, 11 (1945).[44]

This goes beyond the common law. At common law, the array was not subject to challenge so long as the officer who prepared it (at common law the sheriff) stood indifferently as to the parties and issues.[45]

Our peculiarly American development[46] came in criminal cases under the 14th Amendment and the Acts of 1875 (8 U.S.C.A. §44) and 1879 (Jud. Cod. §276, 28 U.S.C.A. §412). (See note 23.) If it is to be generalized beyond its statutory basis and the actual holdings of the cases that developed it,[46] it can fairly be stated to be this: A party entitled to a trial by jury is entitled to have the list from which the jurors will be drawn so prepared that class prejudice has not worked a **systematic, arbitrary** and **purposeful** discrimination against and exclusion of fellow members of a class determined by race, color, party affiliation, or other consideration irrelevant to the performance of a high duty of citizenship and such that the

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44. Compare *People v. Arceo*, 32 Cal. 40, 45 (1867), quoting Mr. Justice Storey's opinion in *United States v. Cornell*, 2 Mason 91, Fed. Cas. No. 14,868 (1820); *Shettel v. United States*, 113 F.2d 34 (C.A. for Dist.Col.,—1940), quoting the *Cornell Case* in note 11.

45. See 3 *Bl. Com.*, 359; 2 *Comyns, Digest*, 3 ed., 200 (Challenge, (B) Challenge to the Array); 19 *Halsbury's Laws of England*, 2 ed., 303 (Title Juries, par. 631); *Proffatt, Jury Trial* (1880), §149 et seq.; *Thompson & Merriam, Juries* (1882), §126. The total absence of discussion of the question in the case at bar in *Proffatt*, and the almost casual reference to the decisions of this Court of 1880 and 1881 in *Thompson & Merriam*, speak volumes.

46. See notes 21 and 23 above. Such a generalization must be made and used with caution. If it is proper, how it shall be framed to describe classes not selected by the legislature in prohibiting discrimination, involves various considerations, some of which are discussed below at pp. 50-57.

exclusion will, or might reasonably be expected to, reflect itself in the jury's determination,[47] **solely because of membership in that class.**

*Strauder v. West Virginia*, note 24 above;
*Virginia v. Rives*, note 25 above;
*Neal v. Delaware*, note 29 above;
*Bush v. Kentucky*, note 30 above;
*Gibson v. Mississippi*, page 24 above;
*Rawlins v. Georgia*, note 57 below;
*Martin v. Texas*, note 36 above;
*Thomas v. Texas*, note 36 above;
*Hale v. Kentucky*, page 27 above;
*Smith v. Texas*, page 27 above;
*Glasser v. United States*, page 27 above;[48]
*Akins v. Texas*, page 27 above.[49]

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47. If the exclusion is "the result of race or class prejudice" (*Rawlins v. Georgia*, supra) it is fair, perhaps, to assume that the prejudice is reciprocal and may reflect itself in the jury's determination of a criminal case.

But it is equally fair to say that an exclusion would not so reflect itself in a civil action where neither party is a member of the excluded class and the issues to be tried are not of the sort to make an appeal to the assumed prejudices of the excluded class. Cf. *Thiede v. Utah*, 159 U.S. 510, 40 L.ed. 237 (1895); *Agnew v. United States*, 165 U.S. 36, 41 L.ed. 624 (1897); *Ex parte Spies*, 123 U.S. 131, 31 L.ed. 80 (1887); *Lang v. New Jersey*, 209 U.S. 467, 52 L.ed. 894 (1908); *In re Housing Authority*, 126 N.J.L. 60, 17 A.2d 812 (1941). We shall return to this. See p. 50 et seq. below.

48. Illinois statutes providing for women jurors became effective July 1, 1939. The county boards were slow in getting women on their jury lists. In such circumstances, it was not error to omit women from the Federal jury lists, where they were excluded but not solely because they were women. Cf. *People v. Shannon*, 203 Cal. 139, 263 Pac. 522 (1928), where the reason for exclusion of women was that the county courthouse did not have accommodations for a jury of two sexes. The later case of *People v. Parman*, 14 C.2d 17, 92 P.2d 387 (1939), indicates, however, that under the law of California, the jury lists may be restricted to men. See notes 54 and 90.

49. Acc., *Wong Yim v. United States*, 118 F.2d 667 (C.C.A. 9,—1941—cert. den. 313 U.S. 589, 85 L.ed. 1544); *Beckett v. United States*, 84 F.2d 731 (C.C.A. 6,—1936).

The right is **not** of **inclusion** on the jury list of any particular person or class, or to a particular sort of jury. The right is only that there shall be no **systematic, purposeful, and arbitrary exclusion** of qualified and non-exempt persons **solely because of membership** in a class determined by prejudice and irrelevant considerations. If a class is determined by reasons relevant to the performance of jury duty,[50] its exclusion, based on justifiable demands of individuals or the community, and not on class prejudice, is permissible. Traditionally people, individually and by classes, have been excluded (disqualified, exempted, or excused)[51] on the basis of considerations thought to affect their capacity to act as jurors[52] or

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50. Legal status (citizenship, conviction of felony, etc.), capacity in fact, hardship, etc.

51. *Rawlins v. Georgia*, 201 U.S. 638, 640, 50 L.ed. 899, 900 (1906); 3 *Bl. Com.* 364; 2 *Comyn's Digest*, 3 ed. (1792) 139, Challenge (A. 4). See notes 52-57 below. Compare the practice outlined in *United States v. Brady*, 47 F.Supp. 362 (1942), aff'd 133 F.2d 476 (C.C.A. 4, 1943—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727). Property qualifications are of old standing. There was such a qualification in California up to 1915. (See App. A, p. 8, note 10.)

See 5 *Holdsworth, History of English Law*, 186-190.

52. See California Statutes, App. A, p. 8; *Thompson & Merriam, Juries* (1882), §§21-26; *Proffatt, Jury Trial* (1880), §114 et seq. See Judge Knox's summary in his address to the Denver Bar Association, Oct. 16, 1944, 21 *Dicta* 283, 286 and Report to the Judicial Conference of the Committee on Selection of Jurors [Knox Committee], September 1942, p. 33 et seq. The New York qualifications of 1882 are set out in *Wood v. Brush*, 140 U.S. 278, 284, 35 L.ed. 505, 508 (1891). Compare the Mississippi requirements of ability "to read and write" and "good intelligence, fair character and sound judgment" noticed in *Smith v. Mississippi*, 162 U.S. 592, 594, 40 L.ed. 1082, 1083 (1896), the Delaware specification "sober and judicious" and exemptions noticed in *Neal v. Delaware*, 103 U.S. 370, 389, 26 L.ed. 567, 571 (1881), and the Texas statute quoted in note 3 of *Akins v. Texas*, Oct. Term, 1944, No. 853 ..... U.S. ....., 89 L.ed. (Adv. Op.) 1206, 1209, 65 Sup. Ct. Rep. 1279 (1945).

considerations of hardship or grave inconvenience to the community, class or individual.[53] It has never been thought that the rule forbidding discriminatory exclusion because of class prejudice prevented those charged with determining the method of preparing the jury list, or preparing it, from excluding persons, individually or by classes determined rationally and not by prejudice, so long as the process was reasonably calculated to produce a fair and impartial jury.[54]

*Strauder v. West Virginia*, 100 U.S. 303, 25 L.ed. 664, 666 (1880);[55]

*Neal v. Delaware*, 103 U.S. 370, 386, 26 L.ed. 567, 570 (1881);

*Gibson v. Mississippi*, page 24 above;

*Jugiro v. Brush*, 140 U.S. 291, 297, 35 L.ed. 510, 513 (1891);[56]

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53. See note 52 above. Cal. C.C.P. §200, App. A, p. 9; *Thompson & Merriam, Juries* (1882), §§34-38; *Proffatt, Jury Trial* (1880), §119, et seq.; *Rawlins v. Georgia*, note 51 above; *Neal v. Delaware*, note 52 above.

54. The Nineteenth Amendment does not compel the states to make women eligible. *Comm. v. Welosky*, 276 Mass. 398, 177 N.E. 656 (1931), cert. den. 284 U.S. 684, 76 L.ed. 578.

55. "We do not say that, within the limits from which it is not excluded by the Amendment, a state may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having certain qualifications. We do not believe the 14th Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. * * * We are not now called upon to affirm or deny that it had other purposes."

56. "It rests with each State to prescribe such qualifications as it deems proper for jurymen, taking care only that no discrimination, in respect to such service, be made against any class of citizens solely because of their race."

*Rawlins v. Georgia*, 201 U.S. 638, 640, 50 L.ed. 899, 900 (1906);[57]

*United States v. Wood*, note 43 above.

Cf. *Kohl v. Lehlback*, 160 U.S. 293, 299, 40 L.ed. 432, 434 (1895).

**2. Subsidiary Working Rules Developed from the General Principle That There Shall Be No Discrimination Because of Class Prejudice.**

From the general principles some precise working rules have developed.

"A mixed jury, some of which shall be of the same race with the" party "cannot be demanded, as of right, in any case." (*Martin v. Texas*, supra.) There is no right to have on the list or jury **any** member of the class to which the challenging party claims to belong.

*Virginia v. Rives*, note 25 above;

*Neal v. Delaware*, note 29 above;

*Bush v. Kentucky*, note 30 above;

*Wood v. Brush*, 140 U.S. 278, 285, 35 L.ed. 505, 508 (1891);

*Jugiro v. Brush*, 140 U.S. 291, 35 L.ed. 510 (1891);

*Gibson v. Mississippi*, p. 24 above;

*Martin v. Texas*, note 36 above;

*Thomas v. Texas*, 212 U.S. 278, 282, 53 L.ed. 512, 514 (1909);

*Akins v. Texas*, supra.[58]

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57. "But if the state law itself should exclude certain classes on the bona fide ground that it was for the good of the community that their regular work should not be interrupted, there is nothing in the 14th Amendment to prevent it." See note 58 below.

58. "Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. * * * Our directions that indict-

*A fortiori* a litigant cannot complain because there is no class representation on the jury list or jury in proportion to population. He is not entitled to a list made up of all classes, or specified classes, or any class in any given proportion.[59]

*Akins v. Texas*, supra;[60]

*Virginia v. Rives*, note 25 above;

*Thomas v. Texas*, 212 U.S. 278, 282, 53 L.ed. 512, 514 (1909);[61]

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ments be quashed when negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and **not the theory that racial groups must be recognized.** *Norris v. Alabama*, 294 U.S. 587, 79 L.ed. 1074; *Hill v. Texas*, 316 U.S. 400, 86 L.ed. 1559, and *Smith v. Texas*, 311 U.S. 128, 85 L.ed. 84, all supra. The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present * * *."

59. State cases to the same effect: *Jackson v. State*, 180 Md. 658, 26 A.2d 815, 816 (1942); *State v. Pierre*, 198 La. 619, 3 So. 2d 895 (1941), cert. den. 314 U.S. 676, 86 L.ed. 541; *Miera v. Territory*, 13 N.M. 192, 81 P. 586 (1905); ~~*J. H. Williams Co. v. Am. Tie etc. Co.*~~, 139 Ga. 74, 76 S.E. 676 (1912). Dame

60. See note 58. The Court also said: "Fairness in selection has never been held to require proportional representation of races upon a jury. *Virginia v. Rives*, 100 U.S. 313, 322, 323, 25 L.ed. 667, 670, 671; *Thomas v. Texas*, 212 U.S. 278, 282, 53 L.ed. 512, 513. Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection."

The number of possible classes which might be, or be claimed to be, a class or classes of which a litigant imagines himself a member equally "stands in the way of evolution" of a concept that every such class is a candidate for discrimination. Compare note 63, below.

61. The Court said, by quotation: "It may be that the jury commissioner did not give the negro race a full *pro rata* with the white race in the selection of the grand and petit juries in this case; still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and did

*Wong Yim v. United States*, 118 F.2d 667 (C.C.A. 9,—1941, cert. den. 313 U.S. 589, 85 L.ed. 1544);

*Beckett v. United States*, 84 F.2d 731 (C.C.A. 6, 1936).[63]

Indeed, absence of any given class from the jury list or jury is without significance. It has no tendency to show improper conduct. It does not show the "purpose to discriminate" that must be present. (*Akins v. Texas*, p. 27 above.) It will not support an inference that the essential elements of valid complaint are present, i.e., systematic, purposeful, and arbitrary discrimination against members of a class solely because of membership in that class.

*Virginia v. Rives*, note 25 above;

*Bush v. Kentucky*, note 30 above;[64]

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not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated."

62. The rule is violated if "there is a systematic or arbitrary exclusion * * * of a particular race." But "the mere fact that the juries drawn from the lists represented only certain races, does not show that the list was made to include only two or three races or that it was in any manner discriminatory."

63. "The appellants wholly failed to produce any substantial evidence to establish a practice of systematic and arbitrary exclusion of negro citizens from the jury service. The proofs affirmatively show that a substantial number of colored citizens of the district were on the jury list. The fact that none were drawn for trial is, of course, not controlling. * * * We know of no statutory or constitutional mandate which requires proportional representation on jury lists of racial, religious, political or occupational groups within the district. Such requirement is not imperative to the drawing of a fair and impartial jury, would make impossible the functioning of the court and nullify the constitutional imperative that commands a speedy trial." Compare note 60 above.

64. After the matter first quoted in note 30 and ending "because of their race or color," the court went on: "It might have been true that only white citizens were selected and summoned; yet it would not necessarily follow that the officers had violated the law and the special instructions given by the court 'to pro-

*Wood v. Brush*, 140 U.S. 278, 35 Led. 505 (1891);

*Jugiro v. Brush*, 140 U.S. 291, 35 Led. 510 (1891);

*Gibson v. Mississippi*, p. 24 above;

*Thomas v. Texas*, note 61 above;[65]

*Martin v. Texas*, note 36 above;

*Franklin v. South Carolina*, 218 U.S. 161, 167, 54 Led. 980, 984 (1910);

*Ruthenberg v. United States*, 245 U.S. 480, 62 Led. 414 (1918);

*Akins v. Texas*, *notes* 58 and 60 above.

See *Snowden v. Hughes*, 321 U.S. 1, 9, 88 Led. 497, 503 (1944).[66]

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ceed in the selection without regard to race, color or previous condition of servitude.'"

65. "It was ruled in *Martin v. Texas*, 200 U.S. 316, 50 Led. 497, as in other cases, that discrimination in organizing a grand jury and impanelling a petit jury cannot be established by merely proving that no one of the defendant's race was on either of the juries. . . ."

66. "But a discriminatory purpose is not presumed, *Tarrance v. Florida*, 188 U.S. 519, 520, 47 Led. 572, 573, 23 S.Ct. 402, there must be a showing of 'clear and intentional discrimination.' *Gundling v. Chicago*, 177 U.S. 183, 186, 44 Led. 725, 728, 20 S.Ct. 633; see *Ah Sin v. Wittman*, 198 U.S. 500, 507, 508, 49 Led. 1142, 1145, 1146, 25 S.Ct. 756; *Bailey v. Alabama*, 219 U.S. 219, 231, 55 Led. 191, 197, 31 S.Ct. 145. Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face, *Neal v. Delaware*, 103 U.S. 370, 394, 397, 26 Led. 567, 573, 574; *Norris v. Alabama*, 294 U.S. 587, 589, 79 Led. 1074, 1076, 55 S.Ct. 579; *Pierre v. Louisiana*, 306 U.S. 354, 357, 83 Led. 757, 759, 59 S.Ct. 536; *Smith v. Texas*, 311 U.S. 128, 130, 131, 85 Led. 84, 86, 87, 61 S.Ct. 164; *Hill v. Texas*, 316 U.S. 400, 404; 86 Led. 1559, 1562, 62 S.Ct. 1159. But, a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. *Virginia v. Rives*, 100 U.S. 313, 322, 323, 25 Led. 667, 670, 671; *Martin v. Texas*, 200 U.S. 316, 320, 321, 50 Led. 497-499, 26 S.Ct. 338; *Thomas v. Texas*, 212 U.S. 278, 282, 53 Led. 512, 514, 29 S.Ct. 393; cf. *Williams v. Mississippi*, 170 U.S. 213, 225, 42 Led. 1012, 1016, 18 S.Ct. 583."

Lower Federal court and state cases are to the same effect.[67]

If members of the class to which the challenging party claims to belong, and which it is claimed was improperly excluded, actually appear on the jury list or jury, this answers the claim of systematic, purposeful and discriminatory exclusion.

*Akins v. Texas*, p. 27 above;
*Murray v. Louisiana*, 163 U.S. 101, 41 L.ed. 87 (1896);
*Thomas v. Texas*, 212 U.S. 278, 53 L.ed. 512 (1918);
*Beckett v. United States*, note 63 above;
*People v. Prior*, p. 30 above;
*Miera v. Territory*, 13 N.M. 192, 81 P. 586 (1905).

**3. Preparation of the Jury List Is Committed to the Discretion of the Clerk and Jury Commissioner.**

Jury lists do not produce themselves. Someone must prepare them. Under the Federal statutes, this is a non-delegable duty of the clerk (or his deputy) and the jury commissioner (Jud. Cod. §278, 28 U.S.C.A. §412 and see App. A, pp. I, 2, note 4). They must have some freedom of action. In the interest of efficient dispatch of the Court's business, they should not include on the list persons who are disqualified, exempt, or certain to be excused. (Cf. *Rawlins v. Georgia*, 201 U.S. 638, 640, 50

67. *Wong Yim v. United States*, note 62 above; *Beckett v. United States*, note 63 above; *Young v. United States*, 242 F. 788 (C.C.A. 4,—1917—cert. den. 245 U.S. 656, 62 L.ed. 533; *State v. Brownfield*, 60 S.C. 509, 39 S.E. 2 (1901), aff'd *Brownfield v. South Carolina*, 189 U.S. 426, 47 L.ed. 822 (1903); *State v. Ryan*, 141 Kan. 549, 42 P.2d 591, 592, col. 1 (1935); *Meeweather v. Commonwealth*, 118 Ky. 870, 82 S.W. 592 (1904); *State v. Logan*, 344 Mo. 351, 126 S.W.2d 256 (1939).

L.ed. 899, 900 (1906),[68] *Beckett v. United States*, note 63 above; *United States v. Brady*, 47 F. Supp. 362 (1942) aff'd 133 F.2d 476 (C.C.A. 4, 1943—cert. den. 319 U.S. 746, 87 L.ed. 1702 reh. den. 319 U.S. 784, 87 L.ed. 1727. See Cal. C.C.P. §198, *et seq.*) They must select "citizens" of proper age, possessed of "natural faculties and of ordinary intelligence and not decrepit," who have a "sufficient knowledge of the English language." (Cal. C.C.P. §198). They must avoid persons "convicted of malfeasance in office or any felony or other high crime" (Cal. C.C.P. 199), take only those "of fair character, and approved integrity, and of sound judgment" (Cal. C.C.P. §205), and should avoid persons having any of the numerous California exemptions (Cal. C.C.P. §200). A wise discretion would dictate avoidance of persons certain to be excused for personal reasons (*Rawlins v. Georgia*, supra).[69]

The duty of the clerk and commissioner calls for the exercise of judgment. To perform their duty they necessarily have committed to them a discretion in making selection of names from which to draw. In *Glasser v. United States*, 315 U.S. 60, 85, 86 L.ed. 680, 707 (1942), this Court said:

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68. "It appeared that the business of the persons omitted was such that either they would have been entitled to claim exemption, or that probably they would have been excused. • • • It could not be denied that the state properly could have excluded these classes had it seen fit, and that undeniable proposition ends the case." See note 57 above.

69. Compare Judge Knox's address to the Denver Bar Association, Oct. 16, 1944, 21 *Dicta* 283, and his testimony before the Committee of the Judiciary of the House of Representatives.—79th Congress, 1st Session.—hearing on H.R. 3379, 3380, 3381, June 12 and 13, 1945—Serial No. 3.

"Jurors in a federal court are to have the qualifications of those in the highest court in the state, and they are to be selected by the clerk of the court and a jury commissioner. Judicial Code §§275, 276, 28 U.S.C.A. §§411, 412. This duty of selection may not be delegated.[70] And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community', and not the organ of any special group or class. If that requirement is observed the officials charged with choosing Federal jurors may exercise some discretion to the end that competent jurors may be called."

*Williams v. Mississippi*, 170 U.S. 213, 42 L.ed. 1012 (1898);[71]

*Franklin v. South Carolina*, 218 U.S. 161, 168, 54 L.ed. 980, 985 (1910);[72]

*Akins v. Texas*, supra;[73]

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70. Acc. *Dunn v. United States*, 238 F. 506, (C.C.A. 5, 1917), holding that before the 1917 Amendment, the clerk's deputy could not act for the clerk.

71. The claim was made that it was improper to commit any discretion to the officers getting up the jury list. The Court held against this and said that the statutes do not "on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them." See other language quoted, note 77, below.

72. The statute gave "to the jury commissioners the right to select electors of good moral character, such as they may deem qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions. * * * The statute simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications."

73. Names for the jury list were selected by the commissioners. "This method of selection leaves a wide range of discretion to the commissioners. Its validity, however, has been accepted by this court."

*Walker v. United States*, 93 F.2d 383, 391 (C.C.A. 8, 1937—cert. den. 303 U.S. 644, 82 L.ed. 1103, reh. den. 303 U.S. 668, 82 L.ed. 1124);[74]

*Wilson v. United States*, 104 F.2d 81 (C.C.A. 5, 1939—cert. den. 308 U.S. 574, 84 L.ed. 481);[75]

*Collins v. State*, 234 Ala. 197, 174 So. 296 (1937).

If the clerk and the jury commissioner properly exercise their discretion, within the rules noticed, their function is discharged. All that is called for is an honest and unbiased effort to obtain a jury list from which no class has been purposefully and systematically excluded because of class prejudice. If their conduct would not subject them to a fine of $5000.00 under §4 of the Act of March, 1875 (8 U.S.C.A. §44, App. A, p. 4), were the

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74. The clerk and commissioner, seeking information, sent out a circular letter saying that the desire was "to obtain for jury service the best men in the community, men of intelligence, unquestioned integrity, and who represent the best interests of the community. We do not want men for this service simply because they have nothing else to do * * *. We want men of business affairs." There was a claim of improper exclusion of "the wage-earning class and unemployed persons and all persons not 'men of business affairs.'" The Court held the challenge was properly overruled and said: "We think the contention is entirely without merit. This court has held that the exclusion of a certain part of a district is proper and that the court need not give any reason, and certainly there is a presumption that it has exercised a sound discretion in making the order and the burden is on the party who seeks to challenge it as arbitrary." It was further held that the clerk and the commissioner had not delegated their function; that "the law does not contemplate that they must acquire personal knowledge of or acquaintance with prospective jurors so that they may act on their personal knowledge. The manner of acquiring information is for them to determine * * * These officers, having discharged their duty in a manner not tainted by any suggestion of evil purpose or fraud, are not subject to criticism."

75. A claim of misconduct on the part of the clerk and commissioner in sending a questionnaire to prospective jurors was overruled.

claimed exclusion for race or color, it would not sustain a challenge to the array. A later verdict against a challenger does not demonstrate denial of the right to a fair and impartial jury.

*Virginia v. Rives*, note 25 above;
*Martin v. Texas*, note 36 above;
*Thomas v. Texas*, notes 36 and 61 above;
*Akins v. Texas*, Oct. Term, 1944, No. 853, ... U.S. ..., 89 L.ed. (Adv. Op.) 1206, 65 Sup. Ct. Rep. 1279 (1945);
*Walker v. United States*, note 74 above.
Cf. *Bush v. Kentucky*, note 30 above;
*Collins v. State*, 234 Ala. 197, 174 So. 296 (1937).

They have no duty to take affirmative steps for the inclusion of any person or class.[76] (See p. 32 above.) They need act only so that there is no discriminatory exclusion, —so that where the claimed exclusion is of a class determined by race or color they do not violate, and subject themselves to the penalties of §4 of the Civil Rights Act of March 1, 1875 (8 U.S.C.A. §44). (Cf. *Ex parte Virginia*, p. 22 above. See *Virginia v. Rives*, 100 U.S. 313, 25 L.ed. 667, 670 (1880).) Whether they so acted is the question in this case.

**4. Whether the Clerk and Jury Commissioner Properly Exercised Their Discretion Is a Question of Fact for the Trial Court.**

Where the clerk and the jury commissioner acted under statutes which do not themselves improperly exclude any

76. If the method is such that there is a fair chance that members of a class may appear on the list nothing more is required. (*State v. Logan*, 244 Mo. 351, 126 S.W.2d 256 (1939).)

eligible class, the question whether they properly exercised their discretion, how they acted and whether they acted honestly, necessarily presents "a question of fact." (*Thomas v. Texas*, 212 U.S. 278, 282, 53 L.ed. 512, 514 (1909) and cases below at p. 44)

The issue is raised by a challenge to the array. It may take the form of a challenge in terms or of a motion to quash. It must be sufficiently precise to present an issue that can be tried and must, on its face, state facts which, if proved, would show an abuse of discretion.

*Virginia v. Rives*, note 25 above;

*Bush v. Kentucky*, note 30 above;

*Williams v. Mississippi*, 170 U.S. 213, 223, 42 L.ed. 1012, 1016;[77]

*Franklin v. South Carolina*, 218 U.S. 161, 167, 54 L.ed. 980, 984;[78]

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77. The charge was that the Mississippi statutes, by granting discretion to the officers who selected the jury list, denied equal protection and benefits of the laws of Mississippi to citizens because of race and color, resulting from the exercise of the discretion partial to the white citizens. The Court said: "It will be observed that there is nothing direct and definite in this allegation either as to means or time as affecting the proceedings against the accused. There is no charge against the officers to whom is submitted the selection of grand and petit jurors, or of those who procured the lists of the jurors. There is an allegation of the purpose of the convention to disfranchise citizens of the colored race, but with this we have no concern, unless the purpose is executed by the Constitution or laws or by those who administer them. If it is done in the latter way, how and by what means should be shown."

78. "There was no allegation in the motion to quash upon this ground, or offer of proof to show that persons of the African race were excluded because of their race or color from serving as grand jurors in the criminal prosecution of persons of that race; therefore the case does not come within the rule laid down in *Carter v. Texas*, 177 U.S. 442, 44 L.ed. 839; *Rogers v. Alabama*, 192 U.S. 226, 48 L.ed. 417, and kindred cases * * *. In this

Cf. *Agnew v. United States*, 165 U.S. 36, 44, 41 Led. 624, 627 (1897);

*Hyde v. United States*, 225 U.S. 347, 373, 56 Led. 1114, 1128 (1912).

This issue of fact is to be determined by the court of original jurisdiction,—the court for which the jury list is prepared. "All challenges, whether to the array or panel or to individual jurors for cause or favor, shall be tried by the court without the aid of triers." (Jud. Cod. §287, 28 U.S.C.A. §424, App. A, p. 7) The trial court is competent to determine the fact.

*Wood v. Brush*, 140 U.S. 278, 285, 35 Led. 505, 508 (1891),[79] followed in

*Jugiro v. Brush*, 140 U.S. 291, 35 Led. 510;

*Andrews v. Swartz*, 156 U.S. 272, 39 Led. 422 (1895);

*Gibson v. Mississippi*, 162 U.S. 565, 584, 40 Led. 1075, 1079 (1896);[80]

*Pierre v. Louisiana*, 306 U.S. 354, 83 Led. 757 (1939);[81]

*Akins v. Texas*, p. 46 below.

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class of cases, when the real objection is that the grand jury is so made up as to exclude persons of the race of the accused from serving in that capacity, it is essential to aver and prove such facts as establish the contention. *Martin v. Texas*, 200 U.S. 316, 50 Led. 497."

79. Whether the grand and petit jurors were properly selected "was a question which the trial court was entirely competent to decide."

80. Referring to matter upon which the challenger claimed to rely, the Court said that if it were competent to prove the matter "it is clear that such evidence would be for the consideration of the trial court on a motion by the accused to quash the indictment."

81. The trial court had quashed the petit jury because of discriminatory exclusion of negroes. The grand jury had been drawn

The determination by the trial court of the issues raised by the challenge to the array is entitled to the same respect as the determination of any other question of fact committed to it. If it finds the fact (a general finding by denial of the challenge is sufficient, *Akins v. Texas*, infra), and that there has been no abuse of discretion by the clerk and the jury commissioner, its finding must be affirmed, if there is any evidence to support it. This Court said in *Thomas v. Texas*, 212 U.S. 278, 281, 282, 53 L.ed. 512, 513, 514 (1909):

> "The only contention was that the Jury Commissioners, in the selection of the grand and petit juries who returned the indictment and tried plaintiff in error, did in fact exclude therefrom negroes or persons of African descent because of their race and color. This was a question of fact; and the ordinary rule is that questions of fact will not be reviewed by this court on writs of error to state courts. * * * As before remarked whether such discrimination was practiced in this case, was a question of fact and the determination of this question adversely to plaintiff in error by the trial court and by the court of criminal appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution which cannot be presumed, and which there is no reason to hold on the record before us."

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from the same box. This Court rested heavily on the finding of the trial court in respect of the list from which the petit jury was drawn and said that if the evidence "was sufficient to support the trial court's action in quashing the Petit Jury drawn from that general venire it necessarily follows that the indictment returned by a Grand Jury selected from the same general venire, should also have been quashed."

This Court stated the rule again in *Akins v. Texas*, Oct. Term, 1944, No. 853, ... U.S. ..., 89 L.ed. (Adv. Op.), 1206, 1209, 65 Sup. Ct. Rep. 1279 (1945) as follows:

> "As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of negroes on the grand jury. Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, *Norris v. Alabama*, 294 U.S. 587, 589, 590, 79 L.ed. 1074, 1076, 1077, 55 S.Ct. 579; *Smith v. Texas*, 311 U.S. 128, 130, 85 L.ed. 84, 86, 61 S.Ct. 164, we accord in that examination great respect to the conclusions of the state judiciary. *Pierre v. Louisiana*, 306 U.S. 354, 358, 83 L.ed. 757, 760, 59 S.Ct. 536. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process', (citing cases)".

Accord:[82]

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82. The rule in the state courts is the same. *Herndon v. State*, 178 Ga. 832, 174 S.E. 597, 601 (1934), app. dis. 295 U.S. 441, 79 L.ed. 1530 (1935); *State v. Walls*, 211 N.C. 487, 191 S.E. 232, 237 (1937), app. dis. and cert. den. 302 U.S. 635, 826 L.ed. 494 (1937); *State v. Henderson*, 216 N.C. 99, 3 S.E.2d 357, 361

Cases at p. 44 above;

*United States v. Johnson*, Oct. Term, 1945, Nos. 115 and 116, ... U.S. ..., 90 L.ed. (Adv. Op.) 389, 66 Sup. Ct. Rep. 464;

*Green v. United States*, 19 F.2d 850 (C.C.A. 9, 1927—aff'd on certiorari limited to question of wire tapping, 277 U.S. 438, 72 L.ed. 944 (1928);[83]

*Robinson v. United States*, 144 F.2d 392, 398 (C.C.A. 6, 1944—aff'd on certiorari limited to another question, 324 U.S. 282, 89 L.ed. (Adv. Op.) 635 (1945).[83]

Cf. *Reynolds v. United States*, 98 U.S. 145, 156, 25 L.ed. 244, 247 (1879) followed in

*Ex parte Spies*, 123 U.S. 131, 179, 31 L.ed. 80, 90 (1887);

*American Tobacco Co. v. United States*, 147 F.2d 93, 118 (C.C.A. 6, 1944—cert. gr. ltd. to another question, 324 U.S. 836, 89 L.ed. (Adv. Op.) 802).

The point has been reached where the main issue here can be stated: Is there evidence to sustain the finding of the trial court that there was no discriminatory exclusion,—systematically, purposefully and arbitrarily,—of any class of qualified and non-exempt persons, solely because of membership in that class, to the prejudice of petitioner on the trial of this case? Is there evidence to support the trial court's finding that there was no abuse

(1939); *Lugo v. State*, 136 Tex. Crim. App. 226, 124 S.W.2d 344 (1938); *Hamilton v. State*, 138 Tex. Crim. App. 205, 135 S.W.2d 476 (1940), second appeal 141 Tex. Crim. App. 614, 150 S.W.2d 395 (1941), cert. den. 314 U.S. 609, 86 L.ed. 490.

83. The *Green* and *Robinson Cases* state the rule by saying that the determination of the trial court can not be disturbed unless an abuse of discretion is shown. See, also, *Lugo v. State*, note 82 above; *Hamilton v. State*, note 82 above.

of the discretion committed to the clerk and the jury commissioner?

**5. The Burden of Proof and the Burden of Showing Error Is Petitioner's.**

Here the petitioner has the burden of showing error in want of any evidentiary support for the determination of the trial court. In the trial court, petitioner had the burden of proof of his claim by competent evidence. There are no presumptions to assist him. To the contrary the presumptions are the other way. In *Akins v. Texas*, supra, this Court said:

> "The burden is, of course, upon the defendant to establish the discrimination. *Tarrance v. Florida*, 188 U.S. 519, 520, 47 L.ed. 572, 573, 23 S.Ct. 402; *Martin v. Texas*, 200 U.S. 316, 50 L.ed. 497, 26 S.Ct. 338; *Norris v. Alabama*, 294 U.S. 587, 590, 79 L.ed. 1074, 1077, 55 S.Ct. 579. An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure: the requirement of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses. It cannot be lightly concluded that officers of the courts disregard this accepted standard of justice."

In *Glasser v. United States*, 315 U.S. 60, 87, 86 L.ed. 680, 708 reh. den. 315, U.S. 827, 86 L.ed. 1222 (1942), this Court said, referring to a stipulation that an affidavit might be accepted as proof:

> "In the absence of such a stipulation, it is incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion: the formal affidavit alone, even though uncontroverted, is not enough. *Smith v. Mississippi*, 162 U.S. 592,

40 L.ed. 1082; *Tarrance v. Florida*, 188 U.S. 519, 47 L.ed. 572; cf. *Brownfield v. South Carolina*, 189 U.S. 426, 47 L.ed. 882.[84] * * * The failure of petitioners to prove their contention is fatal."

In *Lewis v. United States*, 279 U.S. 63, 73 L.ed. 615, 619 (1929), this Court said that if "the contrary is not expressly shown", compliance with the Federal statutes dealing with preparation of jury lists

> "may be taken as sufficiently established by the presumption of regularity. It is the settled rule that all necessary prerequisites to the validity of official action are presumed to be complied with and that where the contrary is asserted it must be affirmatively shown."

Accord:[85]

*Neal v. Delaware*, 103 U.S. 370, 26 L.ed. 267 (1881);

*Bush v. Kentucky*, 107 U.S. 101, 27 L.ed. 354 (1883);

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84. The Court held in this case that a motion is not a pleading, does not require an answer and is not taken as true if not controverted.

85. The holdings of the lower Federal Courts and State Courts are to the same effect. *Mamaux v. United States*, 264 F. 816, 819 (C.C.A. 6,—1920); *Wolf v. United States*, 292 F. 673, 678 (C.C.A. 6,—1923); *Hindman v. United States*, 292 F. 679, 682 (C.C.A. 6,—1923); *Carroll v. United States*, 16 F.2d 951, 955 (C.C.A. 2,—1927, cert. den. 273 U.S. 763, 71 L.ed. 880); *Needham v. United States*, 73 F.2d 1, 2 (C.C.A. 7,—1934, cert. den. 294 U.S. 705, 79 L.ed. 1241); *Walker v. United States*, note 74 above; *United States v. Brady*, 47 F.Supp. 362, 368 (1942), aff'd 133 F.2d 476, 480 (C.C.A. 4,—1943—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727); *State v. Brownfield*, 60 S.C. 509, 39 S.E. 2 (1901), aff'd 189 U.S. 426, 47 L.ed. 882 (1903); *Haynes v. State*, 71 Fla. 585, 72 So. 180, 182 (1916); *State v. Dallao*, 187 La. 392, 175 So. 4 (1937), app. dis. and cert. den. 302 U.S. 635 and 636, 82 L.ed. 494 and 495, reh. den. 302 U.S. 776 and 777, 82 L.ed. 601; *State v. Pierre*, 198 La. 619, 3 So.2d 895 (1941), cert. den. 314 U.S. 676, 86 L.ed. 541; *J. P. Williams Co. v. American etc. Co.*, 139 Ga. 74, 76 S.E. 675 (1912).

*Tarrance v. Florida*, 188 U.S. 519, 520, 47 L.ed. 572, 573 (1903);

*Brownfield v. South Carolina*, 189 U.S. 426, 47 L.ed. 882 (1903);

*Martin v. Texas*, 200 U.S. 316, 50 L.ed. 497 (1906);

*Thomas v. Texas*, page 45 above;

*Franklin v. South Carolina*, note 78 above;

*Snowden v. Hughes*, note 66 above.

The presumption was not met, much less overcome. The burden was not sustained. The evidence amply supports the determination of the trial court. Indeed, the trial judge could have made no other determination.

**6. To Carry His Burden, Petitioner Must Affirmatively Show That He Was Prejudiced by Any Claimed Error.**

It is not enough for a party complaining of a judgment to show that there was some irregularity in the proceedings. He must not only show error, but that he was prejudiced by that error. He must show that he was prejudiced in a substantial way. "On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." (Jud. Cod. §269, 28 U.S.C.A. §391) Prejudice must be shown.[86] It is not presumed. The presumption is the other way.[87]

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86. *Horning v. Dist. of Columbia*, 254 U.S. 135, 65 L.ed. 185 (1920); *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 66 L.ed. 927, 930 (1922); *Palmer v. Hoffman*, 318 U.S. 109, 116, 87 L.ed. 645, 651 (1943); *Shuman v. United States*, 16 F.2d 457

The rule just noticed applies as well to the operation of the machinery for getting jurymen into the box and from them selecting jurors, as to any other step leading to a final judgment."[87] When class discrimination is claimed the challenger must show a "discrimination which affects" him. (*Akins v. Texas*, supra. Cf. pp. 42-50 above.)

Wrongful exclusion of a class from the jury list is colorless unless, but for such exclusion, the result probably would have been different. If "the nature of the classes

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(C.C.A. 5,—1927); *Nash v. United States*, 54 F.2d 1006 (C.C.A. 2,—1932—cert. den. 285 U.S. 556, 76 L.ed. 945); *United States v. Parker*, 103 F.2d 857, 863 (C.C.A. 3,—1939—cert. den. 307 U.S. 642, 83 L.ed. 1522); *United States v. Monjar*, 147 F.2d 916, 924 (C.C.A. 3,—1945—cert. den. ..... U.S. ....., 89 L.ed. (Adv. Op.) 1158 and 1159).

87. *Berger v. United States*, 295 U.S. 78, 81, 82, 79 L.ed. 1314, 1318 (1935); *Palmer v. Hoffman*, note 86 above: "He who seeks to have a judgment set aside because of an erroneous ruling has the burden of showing that prejudice resulted."

88. *Agnew v. United States*, 165 U.S. 36, 44, 45, 41 L.ed. 624, 627 (1897); *Hyde v. United States*, 225 U.S. 347, 374, 56 L.ed. 1114, 1129 (1912); *Stroud v. United States*, 251 U.S. 15, 20, 64 L.ed. 103, 111 (1919); *Gaughan v. United States*, 19 F.2d 897, 899 (C.C.A. 8,—1927); *Tierney v. United States*, 280 F. 322 (C.C.A. 4,—1922—cert. den. 259 U.S. 588, 66 L.ed. 1077); *Vesely v. United States*, 276 F. 693 (C.C.A. 9,—1921—cert. den. 259 U.S. 588, 66 L.ed. 1077); *Wuichet v. United States*, 8 F.2d 561, 562 (C.C.A. 6,—1925—cert. den. 270 U.S. 651, 70 L.ed. 781); *Morrison v. United States*, 71 F.2d 358 (C.C.A. 5,—1934—cert. den. 293 U.S. 589, 79 L.ed. 684); *Brookman v. United States*, 8 F.2d 803, 806 (C.C.A 8,—1925); *Walker v. United States*, note 74 above; *Wilson v. United States*, 104 F.2d 81 (C.C.A. 5,—1939—cert. den. 308 U.S. 574, 84 L.ed. 481); *United States v. Meyer*, 113 F.2d 387, 396 (C.C.A. 7,—1940—cert. den. 311 U.S. 706, 85 L.ed. 459); *Rogers v. State*, 133 Ark. 85, 201 S.W. 845, 846 (1918); *People v. Walsh*, 322 Ill. 195, 153 N.E. 357 (1926); *State v. Dallao*, 187 La. 392, 175 So. 4 (1937—app. dis. and cert. den. 302 U.S. 635 and 636, 82 L.ed. 494 and 495, reh. den. 302 U.S. 776 and 777, 82 L.ed. 601); *Miera v. Territory*, 13 N.M. 192, 81 P. 586 (1905); *State v. Leatherwood*, 26 N.M. 506, 194 P. 600 (1920); *Blenden v. State*, 50 Okla. Cr. 313, 297 P. 827 (1931); *State v. Savan*, 148 Ore. 423, 36 P.2d 594 (1934).

excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act" there is no ground of complaint (*Rawlins v. Georgia*, 201 U.S. 638, 640, 50 L.ed. 899, 900 (1906)).

If the assumed class, **in respect of the matter to be submitted to the jury,** is heterogeneous,—if there are no common class prejudices or class bias *quoad hoc*,—the classification is irrelevant to the performance of jury duty, however relevant it may be for other purposes. Herein lies the significance of the designation of certain classes by statute.[89]

The inquiry whether a litigant has been prejudiced in a particular case does not end with recognizing a class, designated by statute or found in fact, having a common viewpoint and bias for its members (or against which others may be prejudiced) such that its exclusion may affect some litigation. Assumed class bias and, by consequence, exclusion of the class from the jury list, cannot be presumed to affect a verdict, and prejudice

89. Dealing specifically with the subject of jury service, Congress has selected classes determined (1) by race or color (Jud. Cod. §278, 28 U.S.C.A. §415; 8 U.S.C.A. §44, App. A, pp. 4-6) and (2) by "party affiliations" (Jud. Cod. §276, 28 U.S.C.A. §412—App. A, p. 3) as classes against which there shall be no discrimination. There is here legislative determination of common class interests and prejudices. In view of the breadth of spirit of the First Amendment, it may be fair to say that there has been a similar legislative determination about religious groups. (Cf. *Marsh v. Alabama*, Oct. Term 1945, No. 114, ..... U.S. ....., 90 L.ed. (Adv. Op.) ....., 66 Sup. Ct. Rep. 276 (1946); *West Virginia v. Barnett*, 319 U.S. 624, 634, 87 L.ed. 1628, 1635 (1943); Cal. Const., Art. I, §4, App. A, p. 12.) Beyond these groups, legalistic assumptions cannot be made. The challenger must produce facts or the court must legislate.

one of the parties, in a particular case if the parties or issues are not such as appeal to the assumed class bias.

If the challenger does not belong to the assumed excluded class there is no room to argue that the exclusion affected his case. He must first show that he belonged to the excluded class. In *Rawlins v. Georgia*, supra, this Court expressly pointed out:

> "It does not even appear that any of the defendants belong to any of the excluded classes."

Compare *Akins v. Texas*, p. 51 above (89 L.ed. (Adv. Op.) at 1210, col. 2).[90]

Equally, there is no discrimination which affects a litigant, if the issues made by the pleadings and actually tried are not such that assumed prepossessions of or against an excluded class would reflect themselves in the determination the jury makes. (Compare *United States v. Wood*, 299 U.S. 123, 149, 81 L.ed. 78, 90 (1936) reh. den. 299 U.S. 624, 81 L.ed. 459; *Ruthenberg v. United States*, 245 U.S. 480, 62 L.ed. 414 (1918); *Lang v. New Jersey*, 209 U.S. 467, 52 L.ed. 894 (1908); *Thiede v. Utah*, 159 U.S. 510, 40 L.ed. 237 (1895); *Agnew v. United States*;

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90. So a white man cannot complain of discrimination against, and exclusion of, negroes (*Commonwealth v. Wright*, 79 Ky. 22, 42 Am. Rep. 203 (1880); *State v. Dierlamm*, 189 La. 544, 180 So. 135 (1938)). Men are in no position to complain of the exclusion of women (*Wuichet v. United States*, 8 F.2d 803 (C.C.A. 8,—1925—cert. den. 270 U.S. 651, 70 L.ed. 781); *McKinney v. State*, 3 Wyo. 719, 30 Pac. 293 (1892); *State v. James*, 96 N.J.L. 132, 114 Atl. 553 (1921); *State v. Carlino*, 98 N.J.L. 48, 118 Atl. 784 (1922), aff'd 99 N.J.L. 292, 122 Atl. 830 (1923); *Commonwealth v. Duca*, 312 Pa. 101, 165 Atl. 825 (1933); *People v. Parman*, 14 C.2d 17, 92 P.2d 387 (1939)), and women cannot complain of the exclusion of men (*People v. Manuel*, 41 Cal. App. 153, 182 Pac. 306 (1919)).

165 U.S. 36, 41 L.ed. 624 (1897); *Ex parte Spies*, 123 U.S. 131, 31 L.ed 80 (1887).)[91]

We have said that here lies the significance of legislative designation of classes. Here too lies the danger of too vague and hasty generalization from the cases decided by this Court. Here it is significant that every decision of this Court was in a **criminal** case;[92] that all but four of the decisions of this Court were in cases of negro defendants and claimed exclusion of **negroes** from the jury (see note 21); that of those four cases, one (*Jugiro v. Brush*, note 21 above) presented a claim of exclusion which, had it been made out, would have come within the same act that applies to the exclusion of negroes,—forbidding disqualification "on account of race, color or previous condition of servitude" (section 4 of Act of March 1, 1875 [8 U.S.C.A. §44, App. A, p. 4]),—and another, (*Ruthenberg v. United States*, note 21 above) presented a claim of exclusion because of political affiliation which, if made out, violated Judicial Code §276 (28 U.S.C.A. §412, App. A, p. 1 at 3); that only two decisions of this Court (the *Rawlins Case* and *Glasser Case*, note 21 above) did not involve claims falling within one of the Federal statutes (the Act of 1875 [App. A, p. 4] or the Act of 1879 [App. A, p. 3, note 5]—see note 23 above); that the discussion in the *Glasser Case* is dictum, the

91. Compare *Miera v. Territory*, 13 N.M. 192, 31 Pac. 586, 587, col. 2 (1905); *In re Housing Authority*, 126 N.J.L. 60, 17 A.2d 812 (1941); *Rose v. Sheedy*, 245 Mo. 501, 134 S.W.2d 1018 (1939); *State v. Hathaway*, 224 Iowa 478, 276 N.W. 207 (1937).

92. This is true of the overwhelming majority (we do not say all, because we may have overlooked some) of the decisions of the lower Federal courts and state courts.

Court was not required to discuss the problem here presented and the dictum did not elect to do so; that in the *Rawlins Case*, the Court was required to consider the question, and held, where the excluded class was not one specified by a Federal statute, that a judgment would not be reversed in the absence of a showing that the exclusion affected the result.[93]

The point of the circumstance that all the decisions of this Court have been in criminal cases is that this Court has had no occasion to discuss whether the issues involved were such as to appeal to prejudices for or against the claimed excluded class (but compare *United States v. Wood*, supra). There is no case in which a greater appeal would be made to class prejudice than one in which a member of a minor group (minor in point of social influence if not of numbers), between which and those representing the dominant social forces mutual prejudices exist, is charged with an offense against society. No such assumption can be made in a civil case. The issues may or may not appeal to social or political prejudices. If we assume a reciprocal antipathy of employer for employee and worker for hirer, what possible bearing can it have in an action where the only significant relationship is that of carrier and passenger, where both employers and employees, for the purposes of that case, belong in the same class (customers of the carrier) and where all those who might be assumed to have the carrier's point of view are excluded, for every "superintendent, engineer, fireman,

93. The Court also indicated that it was proper to omit from the jury list persons whose business was such that "probably they would have been excused."

brakeman, motorman, or conductor on a railroad" (Cal. C.C.P. §§200-12) is excluded from jury service by statute?

This is the significance of the circumstance that all but four decisions of this Court have been in cases of claimed exclusion of negroes: Congress has designated negroes as a class which shall not be excluded. (Act of March 1, 1875, §4, 8 U.S.C.A. §44.) This must be taken as a legislative determination of social antipathies such that exclusions of this class are likely to be reflected in verdicts. This Court has said that the legislative determination accords with the known facts. (*Strauder v. West Virginia*, 100 U.S. 303, 25 L.ed. 664 (1880).) The history of the statute demonstrates its special orientation. (See App. A, note 7.) The decision in the *Civil Rights Cases*, 109 U.S. 3, 27 L.ed. 835 (1883), holding unconstitutional other substantive provisions of the statute of which it was a part has left it standing alone. But it should not be forgotten, on that account, that it was part of Sumner's Civil Rights Act. If the cases brought to this Court since 1880 show anything they confirm the Congressional determination of the social fact. But whatever prejudice results to a negro prosecuted on a criminal charge if members of his race as systematically discriminated against, and whatever irregularity there may be in excluding negroes when a white man is prosecuted on a criminal charge, a white criminal defendant is not prejudiced by the exclusion of negroes (see note 90 above). Nor does the logic of the negro criminal cases reach civil litigation in which both plaintiff and defendant are negroes or whites or in which no one on the jury list belongs to the class in which the challenger's opponent be-

longs. (And compare *Miera v. Territory*, 13 N.M. 192, 81 Pac. 586 (1905).)

Neither the *Jugiro Case* (claimed exclusion of Japs) nor the *Ruthenberg Case* (claimed exclusion of Socialists) reached the stage where it was necessary to consider the question of prejudice to the defendant, because in neither was there any showing of any irregularity in preparing the jury list. The *Glasser Case* is in the same class. However clear the Illinois statutes directing that women be put on juries, there was complete want of proof that they had not been properly included or that selection had been made from the membership of private organizations. The dictum concerned itself with only the most obvious possibilities of irregularity. It did not discuss the question of resulting prejudice to the defendants from any assumed irregularity.

*Rawlins v. Georgia*, 201 U.S. 638, 50 L.ed. 899 (1906), is left as the only decision of this Court which considered the matter in a case like this in which no aspect of the question had received Congressional determination.

**7. In Endeavoring to Carry His Burden, Petitioner Can Rely Only on the Evidence Taken in Open Court.**

Petitioner does not have the benefit of any presumption (p. 48 et seq. above), nor does he have the benefit of any admissions (see note 84 above). His only reliance can be on some proper affirmative showing. The only showing on which he can rely is the testimony *ore tenus*.

**Petitioner has gone outside the record** to call attention to claimed activities of a "civic club" and of the Board of Supervisors of San Francisco. Petitioner's attorney

inspired them.[94] Neither we nor the Court knew of these *ex parte* proceedings, or could have known of them.[95] They are no part of the record and are not before the Court.

*Schley v. Pullman's Palace Car Co.*, 120 U.S. 575, 30 L.ed. 789, 790 (1887).[96]

Accord:

*Thomson v. Gaskill*, 315 U.S. 442, 446, 86 L.ed. 951, 955 (1942);

*Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589, 83 L.ed. 1001, 1008 (1939);

*Metropolitan R. Co. v. McFarland*, 195 U.S. 322, 329, 49 L.ed. 219, 223 (1904);

*Agnew v. United States*, 165 U.S. 36, 45, 41 L.ed. 624, 627, 628 (1897);

*The New York etc. Co. v. Fraser*, 130 U.S. 611, 620, 32 L.ed. 1031, 1034 (1889);

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94. In note 5, p. 3 of our Answer to the Petition for Certiorari, we said of these matters which are not only wholly outside the record, but are equally outside the case itself, that petitioner's attorney "was a past president of this 'civic club' and that he instigated and took the lead in the proceedings referred to." This footnote 5 is noticed in petitioner's Reply Brief on Certiorari (f 5). There is no denial of the statement just quoted.

95. Their first appearance, at any stage in this case, was in the Petition for Certiorari. For reasons not disclosed, but obviously not those which should have governed his conduct, petitioner's attorney did not suggest these matters to the Circuit Court of Appeals.

96. If counsel does not appreciate the impropriety of reference to such matter this case will point it out for him at some length. The following might be consulted, too: *Waldron v. Waldron*, 156 U.S. 361, 379, 39 L.ed. 453, 458 (1895); *Berger v. United States*, 295 U.S. 78, 85, 79 L.ed. 1314, 1320 (1935); *Hall v. United States*, 150 U.S. 76, 37 L.ed. 1003 (1893).

*Congress etc. Spring Co. v. Knowlton*, 103 U.S. 49, 61, 26 L.ed. 347, 351 (1881);

*Kerr v. Clampitt*, 95 U.S. 188, 24 L.ed. 493 (1877);

*United States v. Hosmer*, 9 Wall. 432, 19 L.ed. 662 (1870).

Moreover, they **never** could have been part of the record. It is not only that they would not have been admissible. They could not even have been offered. They came long after the action of the trial court which is here complained of. They were not before the Court, could not have been before the Court, and cannot furnish any basis for arguing that the Court did not rule properly on the showing made to it. (Compare *United States v. Brady*, 47 F. Supp. 362 (1942) aff'd 133 F.2d 476 (C.C.A. 4.—1943—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727); *Wood v. Brush*, 140 U.S. 278, 35 L.ed. 505 (1891) and cases noticed below under this subhead.)

The petition and supporting briefs contain other statements without basis except an **affidavit of petitioner's attorney** filed with petitioner's notice of motion to strike out the jury panel, but never offered in evidence.[97] When the motion came on to be heard, appropriate objection[98]

97. Such statements will be found in the petition at f 2, f 3, f 4. This applies to all statements for which the only record reference in the petition or supporting briefs is "R 63-68." Such references are, of course, to the typewritten record.

98. Where proof can be made by affidavit (it cannot be so made on a motion of this sort—see below), the affidavit must meet the same tests of admissibility as evidence *ore tenus*. (*Willis v. Lauridson*, 161 Cal. 106, 108, 118 Pac. 530 (1911); *Bull v. International Power Co.*, 87 N.J.Eq. 1, 99 A. 111, 114 (1916).) Mere conclusions and generalities, without statement of

to the affidavit was made (R 15, 16).[99] The objection was not ruled on because the affidavit was never offered in evidence (R 15-68) and, by consequence, was not before the Court and is not now before this Court.[100] Had it been offered the objection must have been sustained. On a motion of this sort affidavits are wholly insufficient to support the claim of discrimination. The challenger must "offer distinct evidence in support of the motion; the formal affidavit, alone, even though uncontroverted, is not enough." (*Glasser v. United States*, p. 48 above.) Such an affidavit can be used to show the facts only where

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evidentiary fact, are insufficient for any purpose. (*Willis v. Lauridson*, supra; *Bull v. International Power Co.*, supra; *Mason v. San-Val etc. Co.*, 1 C.2d 666, 672, 36 P.2d 620 (1934); *A. G. Col. Co. v. Superior Court*, 196 Cal. 604, 615, 238 Pac. 926 (1925); *Schwartz v. Arata*, 45 C.A. 596, 606, 188 Pac. 312 (1920).) Hearsay statements are without probative effect when met with objection on that ground. (*Bull v. International Power Co.*, supra; *A. G. Col. Co. v. Superior Court*, supra; *Pandolfo v. United States*, 286 Fed. 8, 20 (C.C.A. 7,—1922—cert. den. 261 U.S. 621, 67 L.ed. 831); *In re Roth*, 3 C.A.2d 226, 233, 235, 39 P.2d 490 (1934); *Union etc. Bank v. Kolpenitsky*, 125 N.J.Eq. 125, 4 A.2d 413, 415 (1939).)

99. There was objection to the introduction of any evidence because the grounds stated in the notice of motion were insufficient as matter of law, since they did not show a claim of purposeful, systematic, or arbitrary exclusion of any member of a class to which petitioner belonged. There was objection to consideration of the affidavit upon the ground that the matter in the first paragraph was incompetent, irrelevant, and immaterial; that it was apparent that the rest was hearsay; that the references to what had happened in other cases was immaterial, irrelevant and incompetent and an attempt to raise collateral issues.

100. See 1 *Wigmore*, Evidence, 3d Ed. §17; *Oxford Paper Co. v. United States*, 56 F.2d 895 (Ct. Cl.,—1932); *O'Connell v. O'Connell*, 203 Cal. 541, 543, 264 Pac. 1095 (1928); *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491 (1898); *Foster v. The Liverpool etc. Co.*, 222 Ill. App. 37, 40 (1921).

there is an express or implied stipulation that it can be so used.

*Smith v. Mississippi*, 162 U.S. 592, 600, 40 L.ed. 1082, 1085 (1896);[101]

*Carter v. Texas*, 177 U.S. 442, 447, 44 L.ed. 839, 891 (1900);

*Tarrance v. Florida*, 188 U.S. 519, 47 L.ed. 572 (1903);[102]

*Brownfield v. South Carolina*, 189 U.S. 426, 47 L.ed. 882 (1903);

*Martin v. Texas*, 200 U.S. 316, 50 L.ed. 497 (1906);[103]

*Franklin v. South Carolina*, 218 U.S. 161, 167, 54 L.ed. 980, 985 (1910).[104]

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101. *Neal v. Delaware*, 103 U.S. 370, 394, 395, 26 L.ed. 567, 573 (1881), was distinguished because in that case there was an implied stipulation that the affidavit might be used. The *Smith Case* itself held that in the absence of such a stipulation the affidavit could not serve as evidence; that it could only be used with consent and by order of court; that by consequence the motion was not supported and it could not be held that it was erroneously denied; that it "should have been sustained by the evidence introduced or offered to be introduced by the accused."

102. *Smith v. Mississippi*, supra, was followed and the Court said that "an actual discrimination is not presumed. It must be proved or admitted."

103. The moving party did not introduce evidence "but was content to rely simply on his verified written motion." *Held*, that it was not error to overrule the motions, for "it does not appear that the facts stated in those motions were established by evidence", or that there was any offer of proof.

104. Lower Federal and state court cases are to the same effect. *Mamaux v. United States*, 264 Fed. 816, 819 (C.C.A. 6,—1920); *United States v. Brady*, 47 F.Supp. 362 (1942), aff'd 133 F.2d 476 (C.C.A. 4,—1943—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727); *Franklin v. State*, 85 Ark. 534, 109 S.W. 298 (1908); *Montjoy v. Commonwealth*, 262 Ky. 426, 90 S.W.2d 362 (1935).

In the *Mamaux Case* it was claimed that "wage earners" were excluded as a class. No evidence was introduced. The "motion

There was no such stipulation in this case.

This leaves only the testimony taken on hearing of the motion.

**8. The Evidence Sustains, Indeed Required, the Finding of the Trial Court That There Was No Improper Exclusion of Any Class of Persons From the Jury List to Petitioner's Prejudice.**

Petitioner's first burden on the hearing of the motion was to identify and describe himself,—to show that he was a member of some class claimed to have been excluded improperly from the jury list. (See pp. 50-57) He failed to meet the burden. Literally **no evidence** was offered to identify or describe him. From the proof it is impossible to say whether petitioner is male or female, old or young, white, black, yellow or red, citizen or alien, Jew or gentile, Catholic, Protestant, Buddhist or professing to be soulless as a corporation, rich, comfortable or poor, employer, employed or unemployed, a worker on salary or commission or following an independent calling on a fee basis, skilled or unskilled, hard working, a gentleman of leisure or a play-boy, capitalist or "bum."[105] The only showing in any form was as follows: (a) The complaint, by alleging petitioner's name and the use of pronouns, in-

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was supported by affidavits of the attorney of plaintiff in error." This is insufficient; it "did not dispense with the necessity of actual presentation or offer of specific proof at the time the motion was brought up for action thereon."

105. Six witnesses were called. Two were lawyers who had tried and lost cases against respondent. The others were the clerk, jury commissioner, deputy clerk, and the attorney for respondent. Not one mentioned petitioner. Petitioner did not appear in court on the hearing of the motion (R. 68).

dicated that plaintiff was a male[106] and alleged that he was "28 years of age * * * and was employed as a salesman and was earning about $200.00 per month"[107] (R 3-5). (b) Petitioner's attorney's affidavit (see p. 59 et seq. above) stated that before the accident petitioner "was regularly employed as a wage earner" (R 12). (c) On the hearing of the motion, in response to a question from the Court, petitioner's attorney stated that petitioner was a "white man or Caucasian" (R 33).[108]

Even if we assume this showing can be looked to, to what class, with common interests and prepossessions, does a 28-year-old salesman (on salary or commission not shown), earning about $200 per month in 1940, belong? Can he claim to belong to the "laboring" or "working" class, even if we assume these words are sufficiently unambiguous to describe a readily recognizable class of eligible jurymen having a common outlook?

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106. Respondent's answer, in the same way, assumed that petitioner was a male.

107. These averments were denied by the answer for want of information sufficient to form a belief (R 6).

108. The petition says that petitioner was a machinist or mechanic. There was no such showing before the court on the hearing of the motion.

On the trial of the case petitioner did give some testimony as to his occupation. But this was not before the court on the hearing of the motion to strike out the jury panel, or at the time of the impanelment of the jury, or when petitioner's attorney, after the jury was sworn, undertook "to enter a challenge to the twelve jurors chosen to try this case."

Petitioner's testimony on the trial adds little. He testified: Before the accident he was "a salesman" for Mann Construction Co. in the business of "asbestos, housing, shingles, etc.," working on a commission and earning about $200 per month. Before that he had worked at "Foster's, I think—Foster's Lunch" at $17.50 per week plus his meals. Before that he was a mechanic or machinist working at $40 a week (f 640-642).

Assuming that petitioner sufficiently identified himself as a salesman, or of the working or laboring class, or class of persons of modest income (salary or commission), did he prove to the point necessary to overcome a contrary finding, or produce any evidence, that members of his assumed class were systematically and purposely discriminated against and wrongfully excluded in making up the jury list?

The first answer is that petitioner utterly failed to make such showing because he utterly failed to present evidence to show the composition of the jury list. So far as evidence offered by the petitioner on the hearing of the motion is concerned, every person on the jury list may have been an unskilled worker engaged in working with his hands for a daily wage. (Compare *Merriweather v. Commonwealth*, 118 Ky. 870, 82 S.W. 592 (1904) and cases at pp. 48-50, 60, 61 above.)

The only testimony on the hearing of the motion which threw any light on the composition of this panel[109] was that of the clerk, Mr. Maling, and of Mr. Calbraith, deputy clerk since 1912 (R 52-58). Mr. Calbraith testified: 161 were summoned, 56 were excused, and 105 were on the panel. The summoned jurymen were examined by Judge Roche for qualifications and offered their excuses. Their qualifications were tested against the provisions of the California statute. There was no check, at that time, on the occupation of those who did not offer excuses. From those who offered excuses (not all were allowed), it appeared that at least 25% could be classified as work-

109. This is the only one with which petitioner can have any concern. (*State v. Wilson*, 204 La. 24, 14 So.2d 873, 882 (1943). Cf. *Williams v. Mississippi*, note 77 above.)

ing or laboring people,—who worked with their hands for a daily wage (R 52, 53, 55, 56). It would not be proper to say that most of the jurors on the panel were of the wealthy class (R 56, 57). Among those who offered excuses and, by consequence, were examined and disclosed their occupations, there were: A saleswoman at a department store, leaderman in a shipyard, labor negotiator, employee of the San Francisco Water Department, department store employee, checker-clerk and watchman at a freight terminal, time checker at Hunter's Point (shipyard), stenographer for a drayage concern, employee of piece-work-payment-and-accounting department of Bethlehem Steel Co., employee of traffic and inventory control department of Wadsworth California Co., accountant with a retail jewelry store, manager of a branch men's hat store, journeyman electrician at a shipyard, switchman for the telephone company (R 53, 54).

Mr. Maling testified that he was informed that when the venire was returned, a good many offered the excuse they could not serve because they would lose their pay; that a good many were laborers in shipyards and other places where the Government would be losing workmen they would be needing for War work (R 31).

In the absence of other showing, it must be presumed that there was no improper exclusion from the panel of 105 who served, and that members of the class claimed to have been excluded were in fact on that panel (pp. 48-50, 60, 61 above).

The information obtained on the actual impanelment of the jury in this case was not before the court when it ruled on the motion to strike the panel, but it is interest-

ing that it confirms the presumption. What is to be presumed in the absence of proof was shown to be the fact when, later, proof was made. The details are summarized in Appendix B.

Of the twelve who served, the trial court found: (a) five belonged "with the working man and employee class" and "would be expected to be sympathetic with" working people (see p. 8 above),—two retired railroad postal employees, one working in a shipyard and the other as a janitor, the widow of a clerk, a salesman for a stationery concern, and a retired steel erector; (b) three were important business men,—two insurance brokers and a department manager, not an owner, of an import and export business; (c) four were not readily to be classified,—the wife of a florist, a retired commission merchant, a man in "general insurance" and a rice broker selling on commission. Of the thirteen whose names were called and who were challenged and excused, the following appeared: Two had some connection with petitioner's attorney and one had been an acquaintance of respondent's attorney for some years. By occupation, three were housewives (a liquor salesman's wife, a civil engineer's wife and an army captain's wife), one was a bookbinder, one was office manager for a foodstuffs concern, two were salesmen (one for a law publishing house and the other for a concern selling drawing and blueprint materials), and the others were an insurance broker, an insurance company manager, president of a heavy machinery concern, a bank vice president, vice president of a real estate [sic] concern and a director of Haas Bros [wholesale grocers].

That there was no exclusion in fact of the class claimed to have been excluded answers the claim of systematic

arbitrary and purposeful discrimination against, and exclusion of, that class (see p. 38 above).

The method of selecting the jury panel was testified to by Mr. Maling, clerk of the Court for over 30 years (R 27), by Mr. Mikulich, jury commissioner for about 3 years (R 27, 46), and by Mr. Calbraith, deputy clerk.[110] The facts were testified to principally by Mr. Maling. Mr. Mikulich heard Mr. Maling's testimony and said his answers to the same questions would be about the same (R 46). The testimony shows:

The method has been the same during the period that Mr. Maling was clerk (R 35, 39).[111]

No attention is paid to the state statutes or practice except as to qualifications (R 29, 34, 49).[112] The clerk and commissioner each selected half of the names to go into the box (R 27). When the names were drawn, there were always 300 names in the box. The same box was used for both grand and petit juries (R 35, 36).

From city directories[113] were taken the names of people

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110. Mr. Maling's testimony is at R 27-46, Mr. Mikulich's at R 46-52 and Mr. Calbraith's at R 52-58.

111. There is a presumption in favor of a practice which has been followed this long. Compare *State v. Mercier*, 98 Vt. 368, 127 Atl. 715, 716 (1925). Presumably the district judges knew local conditions and found it proper in the circumstances. (Cf. *Pierre v. Louisiana*, 306 U.S. 354, 362, 83 L.ed. 757, 762 (1939); *Neal v. Delaware*, 103 U.S. 370, 26 L.ed. 567 (1881).)

112. Mr. Maling did not recall the California code sections by number, but made it clear that he was guided by the substance of the California statute. The commissioner made it clear that the machinery—the practice followed—was not the State practice (R 49). The petition misconstrues this testimony.

113. Such use of city directories is proper. (*People v. Walsh*, 322 Ill. 195, 153 N.E. 357 (1926).) There was no deliberate selection of jurymen from the membership of a particular private organization, condemned in *Glasser v. United States*, supra.

who, from occupation and residence, it seemed would make intelligent jurors (R 28).[114] "What organization or what company they are associated with does not enter into it at all" (R 28). **Names have never been selected because of occupation** (R 29). Occupation may be some guide to age. If a man is working as a clerk for a department store, he is probably the right age. **"But that is the only way that I can recall now that the occupation would have anything to do with it"** (R 29). Of course, where the occupation showed a connection with a reputable firm, that knowledge was not disregarded; it was assumed that a person connected with a reputable firm was himself reputable (R 37).[114]. No attempt was made to select business executives (R 36, 37). Some business executives were selected, but so were other employees of business concerns.[115]

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114. The California statutes (C.C.P. §205) call for "fair character and approved integrity" and "sound judgment." See App. A, p. 11.

115. Mr. Maling was asked if he selected primarily business men and business executives. He replied: "Well, not business executives,—if you mean by that that I went out of my way to select a large number of the officers of companies, if that is what you meant by an executive. **I never have done that.**" (R 36, 37) He did not know what their salaries were. About 50% were from the business group. This meant people occupying important positions in business firms or in business and "**also their employees**, who were salesmen and saleswomen, and that sort of thing, the clerks, and bookkeepers, and all that sort of thing. I took all of those people. I did not intend, when I used the word business men, to have you get the idea that I meant all presidents, vice presidents of a corporation or anything like that." The people taken "are working for all sorts of merchants, big and little." (R 37, 38)

The Commissioner testified: "I have tried to keep away from the business end"; "Q: In your selection, do you omit from the jury list wage earners and laborers? A: No." (R 46, 47)

Certain names were avoided. The endeavor was to avoid those people who were disqualified, exempt, or who would surely be excused by the court (R 29, 42, 43, 50).[116]

In line with not putting into the box names of persons certain to be excused by the Court, the names of certain "laborers" or "wage earners" or "working men" were avoided. **But only certain people of this sort were avoided, —only those who work for a daily wage, for whom, on this account, jury service would represent a severe financial loss and who, for this reason, were excused by the Court** (R 29-32, 36, 47, 48).[117] This was the only reason

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116. Those avoided included physicians, pharmacists, telegraphers, and men who operate trains, school teachers, ministers, state and federal officials, and people of that class, who are always excused. (R 29) "Q: One other thing: you aim to keep names out of the box of persons who, either by reason of exemption of the state statute, or by reason of the practice here, that **the judge would excuse** if and when they came to be sworn? **A: Those are the only ones I endeavored to keep out of the box.**" (R 43) "Q: Is it correct that **your only exclusion** in that respect is as Mr. Maling expressed it, that you endeavor not to put into the box the names of those persons, persons of **the type that you know from experience the court will excuse** when the time comes for examination of the juror and swearing in of the panel? **A: That is what we try to do. Q: But otherwise you make no discrimination whatsoever? A: No.**" (R 50)

117. Experience showed that the court always excused men who worked for a daily or hourly wage when they asked to be excused on that account. "The minute that a juror is called into court on a venire and says he is working for $10 a day and cannot afford to work for four, the judge has never made one of those men serve" (R 29, 30). If they give such excuse "my experience has been that every one of the judges has always excused those men who said they could not afford to come here and give up their ~~$10, or $12, or $15~~ a day for the $4 a day that the Government pays them" (R 30, 31). "I said that day laborers, who were dependent upon their daily wage and were getting $10 or $15 a day would always be excused, in my observation, if they came up here and were required to serve as jurors in our court at $4 a day, and so I did not put in the names of those men I thought would be in that category" (R 36). The commissioner's testimony was the same (R 47, 48).

these people were excluded.[118] They were not excluded because of class prejudice. Their wives were taken (R 44). The practice followed was one which Judge Knox, after thorough study of the question as chairman of the committee of district judges appointed for that purpose, concluded was inevitable in metropolitan areas.[119] (See Judge

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118. Mr. Maling testified that he left out men who worked for a daily wage where it was going to affect them financially and was unfair to them. If he felt sure he "would avoid it for that reason, solely for that reason" (R 30). This was the reason he avoided such names (R 32). "Q: And this distinction that you have made is not on the basis of earnings, or wealth, or character of work, but is a distinction based on whether or not a man will be excused because he will lose money. A: That is the only thing that governs me at all in excluding any of them" (R 42). For some of the commissioner's testimony, see notes 116 and 117.

119. It is no ground of complaint that trial judges excuse from jury service people who cannot afford the loss which such service involves. The granting of excuses for reasons personal to individuals, not amounting to grounds of exemption, is committed to the discretion of the trial court. *United States v. Meyer*, 113 F.2d 387, 395 (C.C.A. 7,—1940—cert. den. 311 U.S. 706, 85 L.ed. 459); *Shettel v. United States*, 113 F.2d 34, 36 (U.S.C.A. for D.C.,—1940); *People v. Hickman*, 113 Cal. 80, 84, 45 Pac. 175 (1896); *People v. Arceo*, 32 Cal. 40 (1867); *People v. Patterson*, 58 C.A.2d 837, 843, 138 P.2d 341 (1943,—court may excuse for "good cause and legitimate reason"); *Mullins v. State*, 24 Ala. App. 78, 130 So. 527 (1930), cert. den. 222 Ala. 9, 130 So. 530 (1930); *Bone v. State*, 200 Ark. 592, 140 S.W.2d 140, 142 (1940); *Hallum v. Blackford*, 202 Ark. 544, 151 S.W.2d 82 (1941); *State v. Hayes*, 162 La. 310, 110 So. 486 (1926); *State v. Dallao*, 187 La. 392, 175 So. 4 (1937), app. dis. and cert. den. 302 U.S. 635 and 636, 82 L.ed. 494 and 495, reh. den. 302 U.S. 776 and 777, 82 L.ed. 601; *Mathews v. State*, 19 Okla. Cr. 153, 198 Pac. 112, 116 (1921); *Commonwealth v. Payne*, 205 Pa. 191, 54 Atl. 489 (1903); *State v. Ward*, 60 Vt. 142, 14 Atl. 187 (1888); *Blakey v. Commonwealth*, 182 Va. 614, 29 S.E.2d 863, 865 (1944).

It is proper to excuse a juror because of his private business affairs (*People v. Thacker*, 108 Mich. 652, 66 N.W. 562 (1896); *State v. Savan*, 148 Ore. 423, 36 P.2d 594 (1934); *State v. Browning*, 116 S.C. 252, 108 S.E. 105 (1921). It is proper not to call jurors who will be required to travel long distances, particularly in view of conditions incident to war. (*People v. Pat-*

Knox's address to the Denver Bar Association, Oct. 16, 1944, 21 Dicta, 283, 285 and his testimony printed in Hearings before the Committee of the Judiciary, House of Representatives—Seventy-ninth Congress, First Session—hearing on H.R. 3379, 3380, 3381—June 12 and 13, 1945—Serial No. 3, pp. 8, 13.)

It is proper for the clerk and the jury commissioner to avoid the names of those persons who will surely be excused by the court. (*Rawlins v. Georgia*, 201 U.S. 638, 50 L.ed. 899 (1905); *Carter v. State*, 143 Ga. 632, 85 S.E. 884 (1915). Cf. the practice noticed in *United States v. Brady*, 47 Fed. Supp. 362 (1942), aff'd 133 F.2d 476 (C.C.A. 4, 1943—cert. den. 319 U.S. 746, 87 L.ed. 1702, reh. den. 319 U.S. 784, 87 L.ed. 1727). Compare *Midkiff v. State*, 29 Ariz. 523, 243 Pac. 601, 605 (1926); *People v. Patterson*, 58 C.A.2d 837, 843, 138 P.2d 341 (1943); *Blakey v. Commonwealth*, 182 Va. 614, 29 S.E.2d 863, 865 (1944).)

It is not to be understood that all laborers, or wage earners, or working people, were left out as a class. They were taken, whatever the character of their work and whatever their occupation, if they were employed at a monthly rate, or otherwise so situated that by serving they did not suffer financial loss which they could not

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*terson*, supra; *Blakey v. Commonwealth*, supra.) It is proper to excuse a juror so he may attend college (*State v. Hayes*, supra), and a juror whose national guard regiment is in camp (*State v. Lang*, 75 N.J.L. 1, 66 Atl. 942 (1907), aff'd 75 N.J.L. 502, 68 Atl. 210, aff'd 209 U.S. 467, 52 L.ed. 894 (1908).

Compare *People v. Chrisoulas*, 367 Ill. 85, 10 N.E.2d 382 (1937), where it was held proper to ask prospective jurymen in what three months' period of the year they preferred to serve and assign them for service according to their preferences.

afford (R 30, 36, 37, 42).[120] The commissioner had made a special effort to obtain the names of people who were members of labor unions (R 48, 50).

No attention was paid to financial status—indeed, it was not known (R 43, 45, 46, 51).[121]

No attention was paid to the proportion of men as against women, i.e., there was no attempt to either raise or lower the proportion of men to women (R 32; cf. 48[122]), and there was no discrimination between women because of their husband's occupations (R 44).

There has been no discrimination against negroes or Chinese; they have been on the panels (R 32, 33).[123]

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120. Mr. Maling gave as an example of a man dependent on a daily wage who could not afford to give up his employment, a longshoreman. He said that he did thus just by way of illustration; that he did not exclude the longshoreman just because he was a longshoreman. If a man were engaged in loading and unloading vessels, freight cars, or trucks, on a monthly wage, he would not be excluded. There was an officer of one of the unions on the panel (R 42). A man was not left out because he was a carpenter. He might be on a monthly wage. That he was a carpenter did not indicate he was dependent on day labor. A janitor would be taken. Janitors have served a number of times. A man would not be left out because he was a mechanic (R 30, 31). All wage earners and laboring people are not left out (R 36). If a man were listed as a laborer he could serve if he wanted to serve (R 48).

121. "Q: Might I ask you if it is not a fact that you do select, primarily, those who are of the wealthy group, business men and such? A: No, that is not true" (R 51).

122. The commissioner pointed out the difficulty in getting women to serve,—"it is rather a hardship on women who have their homes, with the burden of housekeeping, motherhood, and the rest" (R 48). This would be particularly true of the type of women petitioner claims should not be excluded, that is the wives of working men and laborers. The moment a woman's husband earned enough to permit them to employ a servant to take care of the house and children, the woman would pass out of the class that petitioner insists should serve.

123. On the hearing of the motion, respondent's counsel stated that there was a negro on the panel from which the jury in this case was drawn. The statement was not challenged (R 32).

The heart of the whole matter appears in the following testimony:

"Q. Now, has there been any purposeful exclusion of Negroes or Chinese?

A. No.

Q. Has there been any purposeful exclusion of men who worked with their hands?

A. Never.

Q. Or any exclusion of men of small salary, whether by day, or otherwise, simply because their salaries were small?

A. Never.

Q. Has there ever been any exclusion of any person simply because he was poor?

A. Oh, no.

Q. Has there ever been any exclusion of any individual who worked at any particular trade, simply because he worked at that trade?

A. No" (R 41, 42).

"Q. As I understand you, you paid no attention whatever to whether the prospective jurors were wealthy or poor, in fact, you knew nothing absolutely about their financial condition, is that correct?

A. I don't know a thing about their financial condition.

Q. And have never attempted to make any selection based on their financial standing?

A. Never.

Q. And the same goes with respect to the women, you have never attempted to make any selection of women based on whether their husbands were engaged in one line of endeavor or another line of endeavor?

A. That is correct.

Q. Or whether they were rich or poor?

A. That is correct.

Q. You just pick them as they come?

A. Yes" (R 45).

"Q. In your selection, do you omit from the jury list wage earners and laborers?

A. No" (R 47).

"Q. Have you ever excluded or attempted to exclude any person or class of persons because of the nature of the work they do?

A. No.

Q. Or because of the amount of pay they receive?

A. No.

Q. Or because of their wealth?

A. No" (R 50).[124]

This quoted testimony of the clerk and the jury commissioner that there was no discrimination is enough, without more, to sustain the finding of the trial court (compare *Akins v. Texas*, and the other cases at p. 48 et seq. above and see, dealing with somewhat similar testimony, *Midkiff v. State*, 29 Ariz. 523, 243 Pac. 601, 604 (1926); *Langrum v. State*, 128 Tex. Cr. 23, 78 S.W.2d 973 (1935)).

In actual operation, about 50% of the panel could be classified as business men or business people, from various businesses of all sizes, large and small,—that is people connected with business or employed by business concerns,[125]—and their wives. The other 50%, more or less,

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124. This is immediately followed by the last two questions and answers quoted in note 116 above.

125. This would include "laboring" people employed by business concerns, large and small (R 36, 37, 46, 47). See note 115 above.

belonged in the other classes (R 32, 35 36 38, 46, 47, 51, 58).

The only other testimony was that of two disgruntled lawyers, each of whom had tried and lost a case against respondent in the Federal court,[126] and some testimony in reply by respondent's attorney.[127]

**9. The Petitioner's Position Is Not Sound in Law or in Fact.**

A number of misconceptions lie at the root of the positions taken in the petition.

The petition assumes that this court is to consider the matter *de novo*. It overlooks the fact that the question presented to the trial court was essentially a question of fact and that on review in this court the only question is whether there is evidence sufficient to sustain the finding (see pp. 42-50 above).

The petition assumes that it was the duty of the clerk and the jury commissioner affirmatively to see to it that

126. These men testified that the juries before whom they tried their cases (long before this case was tried) were typical Federal court juries. They ventured the conclusions, unsupported by detail, that these juries did not have on them any working or laboring people (R 16-27). Compare note 127, which gives the facts.

127. The testimony of respondent's attorney showed (R 58-68): In the case tried by the first of these attorneys, the plaintiff exercised only two peremptory challenges; there were on the jury in that case a man in the investment business, not the proprietor, a retired manufacturers' agent who had had his own small business representing eastern mills, an employee of a textile manufacturer, a retired United States Post Office bookkeeper, an employee, not one of the principal manufacturers, of a meat packing concern, two men connected with life insurance companies in minor capacities, secretary of the Mechanics' Institute, a retired calker and a millwright. On the jury in the other case there were a retired member of the San Francisco Fire Department, an architect, an engineer, a time keeper, a department store salesman, a retired army man, a man who was unemployed.

all classes of eligible persons were represented on the jury list and, more particularly, that they should have anticipated the class to which petitioner might claim to belong,—a class as yet undefined by him,—and were remiss in performing their functions, if such class were not included. As a practical matter, it would be impossible to prepare such a list as petitioner assumes he was entitled to demand (see notes 60 and 63 above, and see our Answer to Petition for Certiorari, pp. 15, 16). As a matter of law, petitioner had no right to the inclusion of any class or person. He was entitled a jury, not a board or arbitrators to which he could nominate his partisans. His right was only that there should be no intentional arbitrary and unjustifiable exclusion of any eligible class (see pp. 27-34 above).

The petition assumes that there was an improper exclusion of Chinese, negroes, women and working people. Passing the proposition that petitioner has failed to take the first step toward showing that he was prejudiced, by showing the class to which he belonged and which he claims was excluded (see pp. 62, 63 above), the short answer is that there was not in fact an exclusion of any of these classes. There was no attempt to exclude working people. In fact they appeared on the jury list and on the jury that tried this case.

If the motion below represents more than just a tactical attempt to insure against the event of an adverse verdict, and the argument reflects a conviction, not just an attempt to collect the insurance, there inheres a deeper vice than the improper assumptions of law and fact. The argument displays unwarranted pessimism about and fatuous dis-

trust of American political and juridical ideals and aspirations, and deprecates American social labors to realize them. It is one of our political ideals that before the law there is no distinction between rich and poor, between worker and hirer; that what each deserves is measured by his conduct. It is one of our juridical aspirations that reason, not emotion, will guide judicial determinations.

What the argument really criticizes is an attempt to select a panel that would decide rationally. It expresses chagrin that the presence of a plaintiff in a wheelchair could not make a sufficiently strong emotional appeal to override the evidence. It expresses surprise that a defendant in a personal injury case should be willing to submit the case to a jury. It looks upon juries as the private preserve of plaintiffs in personal injury cases. The Seventh Amendment does not guarantee the right of trial by jury to plaintiffs in personal injury cases. It says that "in suits at common law,"—all suits, and for a defendant as well as for a plaintiff,—"the right of trial by jury shall be preserved." What sort of a jury system is it that the petition asks when it assumes that a defendant should not be willing to go to trial before a jury so selected and drawn?

Whatever the situation might be if a labor dispute, or an action growing out of a labor dispute, were to be submitted to the jury, there is no basis for arguing that in a case of this sort a man working with his hands for a daily wage, if intelligent,—"of fair character and approved integrity, and of sound judgment" (Cal. C.C.P. §205),—would act differently from a white-collar worker, a man in a managerial position on salary, or a proprietor of a business.

Mere social or economic position, even poverty, without more, does not necessarily indicate want of intelligence or a disposition to reach conclusions by emotion. It is equally true that advancement by intelligent personal effort does not indicate want of fairness or integrity. We do not admit that there is any such American caste system that self-attained economic security is not some indication of intellectual capacity, or is an indication of bias against those who are less able or less fortunate. There is a connection between self-attained advancement and mental capacity, not only for business, but as well for the performance of important duties of citizenship; a connection that our institutions are designed to allow for.

The argument asks this Court to legislate an artificial stratification into classes for the purpose of jury service. It asks a legal stratification against the elimination of which our polity and economy are directed. It attempts to plant itself on decisions of this Court on questions arising out of the negro problem in the south and to pervert the design of those decisions; it attempts to rest on the decision of questions arising out of a situation still grasped by the hand of history—a grasp those decisions aimed to loosen.

## CONCLUSION

It is respectfully submitted that there was no impropriety in the conduct of the clerk and the jury commissioner in selecting names to go into the jury box; that the decision of the trial court to that effect is amply supported by the evidence, that the challenge to the array was properly denied and, by consequence, that the judgment must be affirmed.

Dated at San Francisco, California, this 12th day of March, 1946.

ARTHUR B. DUNNE
*Attorney for Respondent*

**(APPENDIX FOLLOWS)**

# Appendix A

## STATUTES DEALING WITH SELECTION OF FEDERAL PETIT JURIES

FEDERAL STATUTES.[1]

**Judicial Code, §275, 28 U.S.C.A. §411.**[2] (R.S. §800; June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §275, 36 Stat. 1164.) **Jurors; qualifications and exceptions.** Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications,[3] subject to the provisions hereinafter contained, and be entitled to the same exemptions,[3] as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

**Judicial Code, §276, 28 U.S.C.A. §412.**[4] (June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §276, 36 Stat. 1164;

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1. We use the wording of the United States Code.

2. This section, with §4 of the Civil Rights Act of March 1, 1875 (8 U.S.C.A. §44), Judicial Code, §278, 28 U.S.C.A. §415 and Judicial Code §286, 28 U.S.C.A. §423 are the only Federal statutes dealing directly with general qualifications and exemptions of jurors. No Federal statute restricts the power of judges of Federal courts to excuse qualified and non-exempt jurors, in the exercise of their discretion, on a showing personal to the juror not amounting to an exemption. 50 U.S.C.A. §57 deals with employees of U.S. arsenals.

3. The California statutes are set out below.
Only "qualifications" and "exemptions" are determined by state law. "In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling. But Congress has not made the laws and usages relating to the designation and impaneling of jurors in the state courts applicable to the courts of the United States" except as the statutes of the United States, before 1911, permitted adoption of state practice by rule or order. (*Pointer v. United States*, infra note 4, and note 4.)

4. The method of obtaining the names has not always been the same. Under R.S. §800 the Federal courts could "by rule or order,

Feb. 3, 1917, c. 27, 39 Stat. 873.) **Same; manner of drawing.** All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court, or a duly qualified deputy clerk, and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political

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conform the designation and impanelling of juries, in substance, to the laws and usages relating to jurors in the State courts". Under the Act of 1879 any judge could order "the names of jurors to be drawn from the boxes used by the State authorities in selecting jurors." (See *Pointer v. United States*, 151 U.S. 396, 406, 38 L. ed. 208, 213 (1894); *Thompson and Merriam, Juries* (1882), §48 et seq.) But even under these provisions the state practice was not followed in the absence of a rule or order of court. "Congress has not made the laws and usages relating to the designation and impaneling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. In the absence of such rule or order * * * the mode of designating and impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed." (*Pointer v. United States*, supra, quoted in *St. Clair v. United States*, 154 U.S. 134, 147, 38 L. ed. 936, 941 (1894); *Apgar v. United States*, 255 F. 16, 18 (CCA-5, 1919—cert. den. 250 U.S. 642, 63 L. ed. 1185).)

The provisions permitting use of the state practice, or names from the state boxes, were removed in 1911. Since then the only method of getting names has been that of the designated Federal court officials placing names in a Federal jury box. The Federal court officials designated in the statute can not delegate their functions. (*Glasser v. United States*, 315 U.S. 60, 85, 86 L. ed. 680, 707, (1942); *Dunn v. United States*, 238 F. 506 (CCA-5.—1917—holding that before the 1917 amendment the Clerk's deputy could not act for the Clerk).)

party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately without reference to party affiliations[5] until the whole number required shall be placed therein.

**Judicial Code, §277, 28 U.S.C.A. §413.** (R.S. §802; Mar. 3, 1911, c. 231, §277, 36 Stat. 1164.) **Same; apportioned in district.** Jurors shall be returned from such parts of the district,[6] from time to time, as the court shall direct, so as

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5. This reference to political affiliations was introduced by the statute of 1879. This is the first mention in a Federal statute or Federal decision, of party affiliations as a matter for consideration in the selection of names for jury lists.

6. It has been held, repeatedly, that names need not be returned from the whole district. To the contrary, the court may direct that jurors be returned from a part of the district only, under the plain wording of the statute. A jury drawn from names of persons residing in a part only of the district is not subject to challenge on that account. The court can "draw and summon jurors from the entire district" but "it was not necessary, however, that this be done." (*Lewis v. United States*, 279 U.S. 63, 72, 73 L. ed. 615, 619 (1929). Acc., *Agnew v. United States*, 165 U.S. 36, 42, 41 L. ed. 624, 626 (1897); *Ruthenberg v. United States*, 245 U.S. 480, 482, 62 L. ed. 414, 418 (1918); *Jarl v. United States*, 19 F. 2d 891, 894, 895 (CCA-8, —1927—citing earlier cases); *Frantz v. United States*, 62 F. 2d 737, 738 (CCA-6,—1933—following the *Jarl Case* and citing the *Lewis* and *Ruthenberg Cases*); *Needham v. United States*, 73 F. 2d 1, 2 (CCA-7,—1934—cert. den. 294 U.S. 705, 79 L. ed. 1241); *Walker v. United States*, 93 F. 2d 383, 392 (CCA-8,—1937—cert. den. 303 U.S. 644, 82 L. ed. 1124); *Seadlund v. United States*, 97 F. 2d 742, 747 (CCA-7,—1938); *Walker v. United States*, 116 F. 2d 458, 462 (CCA-9,—1940).)

In the *Ruthenberg* and *Seadlund Cases* it was held that the 6th Amendment does not require that the jury be drawn from the whole district and Judicial Code §277 is referred to as indicating that the practice has been otherwise. The *Ruthenberg Cases*, answering the argument that the jurors were not drawn from the entire district, said: "The proposition disregards the plain text of the 6th Amendment, the contemporary construction placed upon it by the Judiciary

to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.

**28 U.S.C.A. §414** deals with juries in the District of Indiana.

**8 U.S.C.A. §44.**[7] **(Mar. 1, 1875, c. 114, §4, 18 Stat. 336.) Exclusion of jurors on account of race or color.** No citizen

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Act of 1789 (Chap. 20, 1 Stat. at L. 73, 88, §29) expressly authorizing the drawing of a jury from a part of the district, and the continuous legislative and judicial practice from the beginning. [Sec. Rev. Stat. §277, Judicial Code [36 Stat. at L. 1164, Chap. 231, Comp. Stat. 1916, §1254]. (Citing earlier cases.)"

7. This is the first Federal statute to deal in terms with exclusion from jury service of any class of person. It was one of the statutes adopted as part of the Congressional scheme of "reconstruction" after the war between the States. It was part of the attempt to secure to the negroes enjoyment of recently acquired civil rights.

On Dec. 18, 1865 the Secretary of State proclaimed the adoption of Amendment XIII. Two companion measures were then introduced in Congress, the Freedman's Bureau Bill and the Civil Rights Bill of April 9, 1866, c. 31, 14 Stat. 27 (see 8 U.S.C.A. §41). The Civil Rights Bill did not in terms refer to jurors. It did secure to all "the same right * * * to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens." In *Strauder v. West Virginia*, 100 U.S. 303, 25 L. ed. 664, (1880) a statute confining jurors to "white males" was held to violate Amendment XIV. As part of its argument the opinion quotes the provisions of the Act of 1866 and says they "partially enumerate the rights and immunities intended to be guaranteed by the Constitution". The clear implication is that the Act was broad enough to strike at discrimination for race or color in selecting names for jury lists. But that case was not decided until 1880.

There were grave doubts as to the constitutionality of the Act of 1866,—whether it was sustained by Amendment XIII. (The question was argued in *Blyew v. United States*, 13 Wall. 581, 20 L. ed. 638 (1872) but the court found it unnecessary to pass on the question.) One of the purposes of Amendment XIV was to remove these doubts. (See *Civil Rights Cases*, 109 U.S. 3, 22, 27 L. ed. 835, 843 (1883); Mr. Justice Field, dissenting in *Ex parte Virginia*, 100 U.S. 339, 25 L. ed. 676 (1880), and in *San Mateo v. So. Pac. R. Co.*, 116 U.S. 145, 149 (1882); *Flack, Adoption of the Fourteenth Amendment*, esp. at 40; *Swisher, American Constitutional Development*, 312-316; *McLaughlin, A Constitutional History of the United States*, stud. ed., 653.) Amendment XIV was proclaimed by the Secretary of

possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000.00.

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State on July 28, 1868. The first acts for the enforcement of Amendments XIV and XV were adopted in 1870 and the Civil Rights Bill of April 9, 1866 was "re-enacted with some modifications in sections 16, 17, 18 of the Enforcement Act passed May 31, 1870" c. 114, 16 Stat. 144. (*Civil Rights Cases*, 109 U.S. at 16, 27 L. ed. at 841; *San Mateo v. So. Pac. R. Co.*, supra at 151.)

Charles Sumner was insisting that a supplementary civil rights bill be adopted and on May 13, 1870 introduced a bill which became the Civil Rights Act of Mar. 1, 1875. (*Storey, Charles Sumner* (30 Am. Statesmen Series), 401 et seq.; *Flack, op. cit.*, 218). See Report of Attorney General (1873), p. 17.

The Act of Mar. 1, 1875 was the "culmination of the efforts of Congress to enact laws for the enforcement of the Fourteenth Amendment". (*Flack, op. cit.*, 277) "With this the record of partisan legislation on reconstruction was closed." (*Dunning, Reconstruction* (22 Am. Nation Series), 255.) Section 4 of that act is the statute here set out and is now 8 U.S.C.A. §44. *This is the first Federal Statute to deal in express terms with discrimination in selecting names for jurors.* (It was anticipated in Tennessee in 1868 and in Louisiana in 1870. *Proffatt, Jury Trial*, §116 at p. 163.)

Section 4 of the Act of Mar. 1, 1875, was sustained, as applied to state officers, in *Ex parte Virginia*, 100 U.S. 339, 25 L. ed. 676 (1880). (And see *Neal v. Delaware*, 103 U.S. 370, 385, 26 L. ed. 567, 570 (1881); *Civil Rights Cases*, 109 U.S. 3, 16, 27 L. ed. 835, 841 (1883); *Gibson v. Mississippi*, 162 U.S. 565, 580, 40 L. ed. 1075, 1078 (1896). But in 1883 §§1 and 2 of the Civil Rights Act of Mar. 1, 1875 were held to be beyond the power of Congress (*Civil Rights Cases*, 109 U.S. 3, 27 L. ed. 567 anticipated in *United States v. Harris*, 106 U.S. 629, 27 L. ed. 290 (1883)). This left §4 as the only substantive provision of the Act of Mar. 1, 1875. It now stands alone, torn from its original context. It is easy to forget its background and real purpose. It was part of the Congressional scheme of "reconstruction"; part of an attempt to solve the negro problem. This was its orientation. The primary objective was the problem of the colored citizen rather than the jury system generally.

**Judicial Code, §278, 28 U.S.C.A. §415.**[8] (June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §278, 36 Stat. 1165.) **Same; not disqualified because of race or color.** No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous conditions of servitude.

**Judicial Code, §297, 28 U.S.C.A. §416** deals with the issuance and service of writs of venire facias to bring persons into court to serve as jurors.

**Judicial Code, §280, 28 U.S.C.A. §417** deals with returning of "jurymen from the bystanders" where the panel is exhausted without obtaining a jury.

**28 U.S.C.A. §417a** empowers the court to select alternate jurors. This is not required, but is committed to the court's discretion. This section also provides how such jurors shall be impaneled. Compare Fed. Rules of Civ. Pro., Rule 47(b).

**Judicial Code, §§282-285, 28 U.S.C.A. §§419-422** deal with grand jurors.

**Judicial Code, §286, 28 U.S.C.A. §423.** (R.S. §812; June 30, 1879, c. 52, §2, 21 Stat. 43; Mar. 3, 1911, c. 231, §286, 36 Stat. 1166.) **Jurors not to serve more than once a year.** No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a

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8. This is only a re-enactment in 1879 of §4 of the Act of Mar. 1, 1875, restricted in application to the Federal courts. Whatever doubts there may have been as to the validity of §4 of the Act of Mar. 1, 1875, until it was sustained in 1880 (see note 7 above), there could be no doubt about a statute restricted in application to the courts of the United States.

juror at any term of said court held within one year prior to the time of such challenge.

**Judicial Code, §287, 28 U.S.C.A. §424.** (R.S. §819; Mar. 3, 1911, c. 231, §287, 36 Stat. 1166.) **Challenges.** When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court[9] without the aid of triers.

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9. Appellate courts will give the same deference to the determination of a fact by the trier of facts upon a challenge to the array or to individual jurors, as to any other determination of fact by the court to which that function is committed. *Akins v. Texas*, Oct. Term, 1944, No. 853, U.S. 89 L. ed. (Adv. Op.) 1206, 65 Sup. Ct. Rep. 1279 (1945); *Pierre v. Louisiana*, 306 U.S. 354, 358, 83 L. ed. 757, 760 (1939); *Thomas v. Texas*, 212 U.S. 278, 281, 53 L. ed. 512, 513 (1909); *Gibson v. Mississippi*, 162 U.S. 565, 581, 40 L. ed. 1075, 1079 (1896); *Wood v. Brush*, 140 U.S. 278, 285, 35 L. ed. 505, 508 (1891); *Ex parte Spies*, 123 U.S. 131, 179, 31 L. ed. 80, 90 (1887); *Reynolds v. United States*, 98 U.S. 145, 156, 25 L. ed. 244, 247 (1879); *Press. Pub. Co. v. McDonald*, 73 F. 440 (CCA 2, 1896—cert. den. 163 U.S. 700, 41 L. ed. 320); *Robinson v. United States*, 144 F. 2d 392, 398 (CCA-6—1944—aff'd on certiorari limited to another question, 324 U.S. 282, 89 L. ed. (Adv. Op.) 635 (1945).) The determination of the trial court will not be disturbed unless an abuse of discretion is shown. (*Green v. United States*, 19 F. 2d 859 (CCA-9, —1927—aff'd on certiorari limited to question of wire tapping, 277 U.S. 438, 72 L. ed. 944); *Robinson v. United States*, supra.)

The practice in state courts is the same. (*Herndon v. State*, 178 Ga. 832, 174 S.E. 597, 601 (1934) app. dis. 295 U.S. 441, 79 L. ed. 1530 (1935); *State v. Walls*, 211 N.C. 487, 191 S.E. 232, 237 (1937) app. dis. and cert. den. 302 U.S. 635, 82 L. ed. 494 (1937); *State v. Henderson*, 216 N.C. 99, 3 SE 2d 357, 361 (1939).)

**28 U.S.C.A. §425** deals with peremptory challenges "in the trial of a capital offense."

**Judicial Code, §288, 28 U.S.C.A. §426** deals with disqualification of jurymen and talesmen "in any prosecution for bigamy, polygamy, or unlawful cohabitation under any statute of the United States."

**CALIFORNIA STATUTES—CODE OF CIVIL PROCEDURE.**

**§198. Persons competent to act as jurors.** A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned;

2. In possession of his natural faculties and of ordinary intelligence and not decrepit;

3. Possessed of sufficient knowledge of the English language.[10]

**§199. Who not competent to act as juror.** A person is not competent to act as a juror;

1. *Who does not possess the qualifications* prescribed by the preceding section;

2. *Who has been convicted of malfeasance* in office or any felony or other high crime; or

3. *Who has been discharged as a juror* by any court of record in this state within a year, as provided in section 200 of this code, or who has been drawn as a grand juror in any such court and served as such within a year and been discharged; or who, in a county or city and county containing a population of not less than three hundred thousand as ascertained by the last preceding census taken under the authority of the congress of the United States, or

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10. A requirement that the person be "assessed on the last assessment-roll * * * on property belonging to him" was in this section until 1915.

the legislature of the state of California, during the preceding two years shall have actually served on twenty days as a trial juror in the trial of cases in a court of record in this state; but a juror must in any event complete his service as such juror in the trial of a case in which he may be actually engaged. The clerk shall immediately remove from the jury list the name of any juror who becomes disqualified under this section.

4. *A person who is serving as a grand juror in any court of record* in this state is not competent to act as a trial juror in any such court. Any person who is serving as a trial juror in any court of this state is not competent to act as a grand juror in any such court.

§200. **Exemptions From Jury Service.** A person is exempt from liability to act as a juror if he be:

1. A judicial, civil, naval or military officer of the United States, or of this State while on active duty;

2. A person holding a county, city and county, city, town or township office of profit;

3. An attorney at law, or the clerk, secretary, or stenographer of an attorney at law;

4. A minister of the gospel, or a priest of any denomination following his profession;

5. A teacher in a university, college, academy or school;

6. A practicing physician, or practicing licensed dentist, practicing chiropodist, or practicing registered optometrist, or druggist, actually engaged in the business of dispensing medicines;

7. An officer, keeper or attendant of an almshouse, hospital, or other charitable institution;

8. Engaged in the performance of duty as officer or attendant of the State prison or of a county jail;

9. Employed on board of a vessel navigating the waters of this State;

10. An express agent, mail carrier, or a superintendent, employee, or operator of a telegraph or telephone company, doing a general telegraph or telephone business in this State, or keeper of a public ferry or tollgate;

11. An active member of the National Guard of California,[11] or an active member of a paid fire department of any city and county, city, town or village in this State;[12] or any exempt member[13] of a duly authorized fire company;

12. A superintendent, engineer, fireman, brakeman, motorman, or conductor on a railroad;

13. A person drawn as a juror in any court of record in this State, upon a regular panel, who has served as such within a year, or a person drawn or summoned as a juror in any such court, who has been discharged as a juror within a year as hereinafter provided; or a person who is incompetent under Subdivision 3 of the preceding section: provided, however, that in counties having less than 5,000 population the exemption provided by this subdivision shall not apply; or,

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11. Compare Cal. Mil. and Vet. Cod., §391.

12. Cal. Health and Safety Cod., §14855 also exempts "officers and members of unpaid fire companies regularly organized, and exempt firemen."

13. "Every fireman who has served five years in an organized fire company in this State is an 'exempt fireman' ". Cal. Health and Safety Cod., §14856.

14. A practitioner who treats the sick by prayer in the practice of the religion of any well recognized church or denomination, or a reader whose duty is to conduct regular religious services of such church or denomination.

**§205 Selection and listing of jurors.** The selections and listings shall be made of persons[14] suitable and competent to serve as jurors, and in making such selections they shall take the names of such only as are not exempt from serving, who are in the possession of their natural faculties, and not infirm, or decrepit, of fair character and approved integrity, and of sound judgment.

**§602 Challanges of jurors for cause; Grounds of challenge.** Challenges for cause may be taken on one or more of the following grounds:

1. *A want of any of the qualifications prescribed* by this code to render a person competent as a juror;

2. *Consanguinity or affinity within the fourth degree* to any party or to an officer of a corporation which is a party;

3. *Standing in the relation of guardian and ward, master and servant,* employer and clerk, or principal and agent, or debtor and creditor, to either party or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party.

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14. Until 1915 the names were to be taken from "those assessed on the last preceding assessment-roll".

4. *Having served as a juror in a civil action or been a witness* on a previous trial between the same parties, for the same cause of action; or having served as a juror within one year previously in any civil action or proceeding in which either party was plaintiff or defendant.

5. *Interest on the part of the juror* in the event of the action, or in the main question involved in the action, except his interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

6. *Having an unqualified opinion or belief* as to the merits of the action founded upon knowledge of its material facts or of some of them.

7. *The existence of a state of mind* in the juror evincing enmity against or bias to either party.

8. *That he is a party to an action pending* in the court for which he is drawn and which action is set for trial before the panel of which he is a member.

CONSTITUTION OF CALIFORNIA.

**Art. I §4.** "* * * and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; * * *."

**Art. XX §11.** "Laws shall be made to exclude from office, serving on juries, and from right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office or other high crimes. * * *"

## Appendix B

### IMPANELMENT OF JURY

We set out here the substance of what occurred when the jury was impaneled. We first deal with the twelve jurors who sat and then with those who were called into the jury box and then challenged or excused. In the case of each we indicate the finding of the trial judge, particularly those stated by him on denial of the motion for new trial. (R. 79-83)

By footnote we indicate such comments of petitioner or his counsel as are answered by the record.

#### THE TRIAL JURORS WHO SERVED.

With the exception of Mr. Hales (R. 120-122), as to whom there was no challenge, every juror who served was **expressly passed for cause** by petitioner's attorney at the conclusion of petitioner's attorney's voir dire examination of the juror.

The trial judge, on denial of the motion for new trial, dealt specifically with five jurors, Mr. Morgan, Mrs. Hardiman, Mr. Knight, Mr. Lutz and Mr. Bright (R. 80, 81), and found that they "belong more closely and intimately with the working man and employee class than they do with any other class, and as to whether the twelve jurors were fairly representatives of the prevalent occupations, we find these five jurors when compared with the others do not belong to the same occupational class as the remaining seven jurors." (R. 81) Again he said that "we find five of them who I think it may be fairly supposed would be expected to

be sympathetic with the experiences in life, the affairs of life, and with the economic views, of people who belong to the working or employee class. I think that might be expected of those five of the twelve jurors." (R. 82) We deal with these five jurors:

**Eugene Morgan** (R. 88-92) Retired United States Mail Service employee, working in Richmond Shipyard No. 1. The character of work done in the postal service or the place where it was performed, does not appear.[15] There was no showing that Mr. Morgan was acquainted with any officer, agent or employee of respondent. Petitioner expressly "passed for cause" (R. 91). The trial judge found that Mr. Morgan "was a shipyard worker at the time he was called away from his work to serve on this case, and had been formerly a railway postal employee." (R. 80)

**Mrs. Catherine Hardiman** (R. 92-94) Housewife. Widow—husband dead going on five years. "He was a clerk." Acquainted with no officials of respondent—"Not a one." Petitioner passed for cause. The trial judge found she "was the widow of a former clerk of the Associated Oil Company, and * * * had never done any work or pursued any occupation". (R. 80)[16]

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15. The petition for certiorari states that Mr. Morgan "had served on the S. P. Co.'s trains" (f. 7, 8). All the record shows is that when asked whether he had ever had any difficulty with respondent, Mr. Morgan said "No, I was sent out on railroad service and I served my time" (R. 92).

16. The record shows only that Mrs. Hardiman's husband had been a clerk. The source of the trial court's information that he had been a clerk for Associated Oil Company does not appear. The petition says that there were two jurors "who might at least appear to be fair. They were the 'steel erector' and the 'widow' " (f. 9).

**Frederick W. Knight** (R. 99-100) Was "with Schwabacher-Frey."[17] The firm did business with Southern Pacific Co., selling materials. He was asked whether he did "that business all the time" and said "I presume they are, although I don't know." He personally did none of that business. "It is not done by me at all." Was unacquainted with any officials of respondent. Did "know some sometime ago, but it has been a long time ago" and at the present time does not personally know any people working for respondent. Petitioner passed for cause. The trial court found Mr. Knight "was a salesman for a stationery business." (R. 80)[18]

**Herbert N. Bright** (R. 105, 106) Retired railroad postal clerk. Asked as to acquaintances in respondent he said: "Well, I know Mr. Goldsmith for some years, and I was quite well acquainted with Mr. Hastings, I have not seen him for quite a number of years." Petitioner passed for cause. The trial court found that "at the time of the trial" he was "employed as a custodian or janitor." (R. 81)[19]

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17. A firm of stationers. The juror's precise connection with the firm does not appear. At a later time petitioner's counsel said "it isn't absolutely clear to me whether it was sales-manager, or ordinary salesman", after the court had commented that Mr. Knight "occupied the high position of salesman" (R. 125).

18. The petition states that Mr. Knight "is an important executive, salesmanager, * * * of Schwabacher-Frey Co., a very large corporation in San Francisco, here which does a considerable business with the Southern Pacific Co." (f. 6). It does not appear that Mr. Knight was "an important executive", or "sales manager" (see note 17) or that Schwabacher-Frey was "a very large corporation" or a corporation at all, or that it did "a considerable business" with respondent.

19. The petition states that Mr. Bright "has ridden on many Southern Pacific trains, and is well acquainted with Mr. Goldsmith of the traffic department of the Southern Pacific Co." A record reference given (f. 486 [R. 125]) is simply to a statement of petitioner's counsel. Petitioner's counsel's general line of statements at this

**William H. Lutz** (R. 122, 123) Retired steel erector. Had neither business dealings with respondent nor acquaintance with any of its officers or employees. Petitioner passed for cause. The trial court found that he "was a retired steel erection man—that is, a working man when he worked." (R. 81)[20]

The trial court said that three jurors "might be termed important business men, having important or leading or outstanding business connections," Maurice A. Gale, Frank Kugelberg and F. M. Hohweisner. (R. 81) The record shows as to these three:

**F. M. Hohweisner** (R. 101-103) Insurance broker. No business relations with respondent or anyone working for respondent. Had friends among the officials of the Southern Pacific Company who are members of my golf club, but that would not influence me." His only acquaintance with these unidentified officials was "just through meeting them at the golf club." Petitioner passed for cause.[21]

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time was so inaccurate, counsel for respondent was compelled to say "Counsel knows a great many things that do not appear on the record; and while I have the opportunity, I want to say that counsel here has made a number of mis-statements as to what occurred during the impanelment of the jury, and what the jurors said. As to those, I don't want to argue the matter; I simply don't want by my silence to have it understood that I am acceding to any of those statements." (R. 128). The record does not show that Mr. Bright had ridden on any Southern Pacific trains or was well acquainted with Mr. Goldsmith or that Mr. Goldsmith was in the traffic department. It does not show who either Mr. Goldsmith or Mr. Hastings was or what connection either had with respondent.

20. The petition (f. 9) states that it definitely appeared Mr. Lutz was employed in some executive capacity and, based on a telephone conversation of January 22, 1944, (over a year after the case was tried) unvouched for, states that he was a contractor in the steel erection business. There is no support in the record for either of these statements. See note 16 above.

21. The petition goes beyond the record and states of Mr. Hohweisner that he "plays golf and is very intimate socially with many of the officials and officers of the Southern Pacific Co."

**Maurice A. Gale** (R. 87, 108, 109) Insurance broker. Owns stock in Pacific Greyhound lines which he said he understood was "connected" with respondent.[22] Was asked if he did any business with respondent and said "I have handled insurance of probably three of the company."[23] Petitioner passed for cause.

**Frank Kugelberg** (R. 118, 119). A department manager, not an owner, of an importing and exporting business. Did a moderate amount of business, not to exceed $5,000 per

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22. At a later time, after the jury was sworn, (R. 124), a question arose as to the "connection" between Pacific Greyhound lines and respondent. The attorney for petitioner stated that the juror had said Greyhound was "a subsidiary" (R. 127). There was no such statement. Counsel for respondent, in response to the request of the court, stated the connection,—that there was no interlocking directorship relationship; that Southern Pacific Company owned a minority stock interest in the Pacific Greyhound Company. The attorney for petitioner said they were "very closely connected", "I have known it for years", after he had just said the connection "was a little bit remote", "somewhat remote." (R. 127, 128) The attorney for respondent said he was not "acceding to any of those statements". (See note 19 above.) After discussion the Court pointed out that the attorney for the petitioner "did not advise the court that he had any specific objection for cause against this juror". Petitioner's counsel said "it was an oversight on my part," and "it just slipped my mind" (R. 129). And after further discussion, petitioner's attorney conceded "a stockholder in the Greyhound Lines could not hope to profit or lose by virtue of a jury's verdict in this case against the Southern Pacific" (R. 130, 131).

It is apparent that the statement in the petition that Mr. Gale owned stock in the Greyhound "which he knows to be a subsidiary of the Southern Pacific Company" (f. 6) is not supported by the record.

23. The petition says: "The record fails to show that he mentioned Angus McDonald, former president of the S. P. Co., as one of his clients" (f. 7). No such statement was made. It could not have been made. Mr. McDonald died in November 1941, a year before this case went to trial, as the records in probate in the Superior Court of the State of California, in and for the County of Marin, will show, in the event petitioner's counsel is interested. The writer of this brief probated Mr. McDonald's estate.

year, with respondent as a shipper. Petitioner passed for cause.

The record shows as to the remaining four jurors who served:

**Mrs. Phyllis B. Goeppner** (R. 94-97) Housewife. Husband a partner in Podesta & Baldocchi, florist. Believed his firm had some business with respondent. She was unacquainted with any official of respondent and did not know whether her husband was acquainted with any of them. Respondent's counsel volunteered that he had a charge account at Podesta & Baldocchi's. Petitioner passed for cause.[24]

**D. Richard Martens** (R. 106-108) Retired commission merchant. Many years ago did business with respondent. Has done none for ten or twelve years. Not now personally acquainted with any officials of or people working for respondent. Petitioner passed for cause.[25] The trial court said: "I don't know, and I don't believe the evidence discloses what importance his financial standing or former business may be or may have been. Of course, one who is retired may be upon that status for many different reasons. It may be business failure or business success" or "change in his physical life or health. I don't know." (R. 82)

**James A. Levensaler** (R. 115-117) "General insurance." Did none with respondent, but did some with some of its employees. Knew Mr. McInnes, an important official of respondent. Petitioner passed for cause.

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24. The petition states the juror's "husband is a florist who does considerable business with the Southern Pacific Co." (f. 6). There is no showing that he or his firm did "considerable business".

25. The record does not show the character or extent of the business done with respondent, ten to twelve years ago.

**Julian H. Hales** (R. 120-122) Rice broker, selling on commission. At times of the year ships for customers over respondent. Knows the head of respondent's freight and passenger department. He was the one juror not expressly passed for cause by petitioner. But there was no challenge. The trial court said that "again we cannot tell without specific information as to the relative importance of his business as compared with that of the so-called managerial or employer class of business." He called himself a "rice broker and accountant." Accountants are not to be regarded in the managerial class, but as belonging to an independent calling. (R. 82)

**JURYMEN CALLED INTO THE JURY BOX AND CHALLENGED OR EXCUSED.**

Thirteen other names were called.

Two jurymen had some connection with the attorney for petitioner:

**Mr. Futernick** (R. 94) Bookbinder. He and petitioner's attorney "had had acquaintance for several years in a fraternal organization." Excused by respondent's first peremptory challenge. (R. 110)

**Mrs. Mabel Lange** (R. 119, 120) Housewife. Husband was sales manager for liquor business. Petitioner's attorney volunteered that he was "acquainted with the lady's husband." Excused by the court at respondent's request.

One juryman was acquainted with respondent's attorney. The record shows:

**Elliot McAllister** (R. 113-115) Vice-president of the Bank of California at which respondent kept an account. Had nothing to do with that account and was unacquainted with any officers or agents of respondent. A personal friend of the attorney for respondent—had known him about 20

years—both entered the University of California along in the 90s [20s] and were friends there. Had not seen a good deal of him—"we meet at social gatherings." The court excused Mr. McAllister after the attorney for respondent had stated "I will consent to the excuse of the juror so that counsel does not have to use a peremptory challenge, but I think it goes very far from good cause." The court stated that, as in the case of Mr. Desmond (see below), there was no "real basis for cause shown." (R. 115)

The record shows as to the other jurymen called:

**Mr. Freese** (R. 97-99) With Bancroft-Whitney Company, law book publishers, in charge of sales inside of the house, filling orders, etc. Did not know respondent's attorney who volunteered that he bought books from Bancroft-Whitney. Sold "not very many" books to respondent. Passed by petitioner for cause and excused by petitioner's first peremptory challenge. (R. 109)

**Mr. Kahn** (R. 100, 101) Insurance broker. Did no business with respondent, but knew one Blue, of the traffic department—met him about a year and a half ago—handling some of his personal fire insurance. Passed by petitioner for cause and excused by petitioner's second peremptory challenge. (R. 112)

**Mr. Freise** (R. 103-105) Connected with a firm (position not shown) which sold drawing material and blue-print material to respondent, and was acquainted with head of purchasing department; had charge of the correspondence. Passed by petitioner for cause and later excused by the court without challenge or explanation. (R. 122)

**Bert A. Gayman** (R. 109, 110) President of Link Belt Company, Pacific Division. Unacquainted with any officers

of respondent. The corporation had business dealings with respondent, as a shipper. Petitioner passed for cause. Later Mr. Gayman, although he had already said so, volunteered that his concern was a large shipper over respondent's lines, and although petitioner had passed for cause, he then "entered" a challenge for cause and it was allowed. (R. 119)

**Mrs. Adrian** (R. 110, 111) Housewife. Husband a civil engineer conducting his own business. He did no business with or for respondent that she knew of. He had no acquaintance with any officials or people working for respondent that she knew of. Petitioner passed for cause. Excused by respondent's second peremptory challenge. (R. 113)

**Clarence E. Allan** (R. 112, 113) Manager, Northern Assurance Company, which had insurance placed by respondent's brokers. So far as he knew, handled no insurance for any employees or officers of respondent. Passed by petitioner for cause and excused by petitioner's third peremptory challenge (R. 117)

**Daniel J. Desmond** (R. 113) Vice president of a real estate [sic.] concern which did in the neighborhood of $50,000 per year business with respondent, i.e., paid that much in freight rates. Personally acquainted with officials or employees of respondent. Excused by the court without challenge.

**Mrs. Norma Walsh** (R. 113) Wife of a captain in the United States Army in San Francisco on leave for only a few days. Excused by consent of both sides.

**Arthur D. Levis** (R. 117) Office manager of Walter Ellis Company, dealers in meal and foodstuffs. The company did

business with respondent practically every day, shipping over its lines. He had no personal contacts with any of respondent's agents or employes. Petitioner's challenge for cause sustained over respondent's objection.

**Carl Welbach** (R. 122) A director of Haas Bros., which did over $50,000 a year business with respondent. Petitioner's challenge was sustained and respondent excepted.

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# SUPREME COURT OF THE UNITED STATES.

No. 349.—October Term, 1945.

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| Gilbert E. Thiel, Petitioner, *vs.* Southern Pacific Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. |

[May 20, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioner, a passenger, jumped out of the window of a moving train operated by the respondent, the Southern Pacific Company. He filed a complaint in a California state court to recover damages, alleging that the respondent's agents knew that he was "out of his normal mind" and should not be accepted as a passenger or else should be guarded and that, having accepted him as a passenger, they left him unguarded and failed to stop the train before he finally fell to the ground. At respondent's request the case was removed to the federal district court at San Francisco on the ground of diversity of citizenship, respondent being a Kentucky corporation. Several vain attempts were then made by the petitioner to obtain a remand of the case to the state court; petitioner was also restrained from attempting to proceed further in the state court.[1]

After demanding a jury trial, petitioner moved to strike out the entire jury panel, alleging *inter alia* that "mostly business executives or those having the employer's viewpoint are purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes who constitute, by far, the great majority of citizens eligible for jury service." Following a hearing at which testimony was taken, the motion was denied. Petitioner then attempted to withdraw his demand for a jury trial but the respondent refused to consent. A jury of twelve was chosen. Petitioner thereupon challenged these jurors upon the same grounds

[1] The injunction against petitioner proceeding in the state court was affirmed upon appeal. Thiel v. Southern Pacific Co., 126 F. 2d 710; certiorari denied, 316 U. S. 698.

previously urged in relation to the entire jury panel and upon the further ground that six of the twelve jurors were closely affiliated and connected with the respondent. The court denied this challenge. The trial proceeded and the jury returned a verdict for the respondent.

Petitioner renewed his objections in his motion to set aside the verdict or, in the alternative, to grant a new trial. In denying this motion the court orally found that five of the twelve jurors "belong more closely and intimately with the working man and employee class than they do with any other class" and that they might be expected to be "sympathetic with the experiences in life, the affairs of life, and with the economic views, of people who belong to the working or employee class." The Ninth Circuit Court of Appeals affirmed the judgment in its entirety, 149 F. 2d 783, and we brought the case here on certiorari "limited to the question whether petitioner's motion to strike the jury panel was properly denied."

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith* v. *Texas*, 311 U. S. 128, 130; *Glasser* v. *United States*, 315 U. S. 60, 85. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers. This discretion, of course, must be guided by pertinent statutory provisions. So far as federal jurors are concerned, they must be chosen "without reference to party affiliations," 28 U. S. C. § 412; and citizens

cannot be disqualified "on account of race, color, or previous condition of servitude," 28 U. S. C. § 415. In addition, jurors must be returned from such parts of the district as the court may direct "so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service," 28 U. S. C. § 413. For the most part, of course, the qualifications and exemptions in regard to federal jurors are to be determined by the laws of the state where the federal court is located, 28 U. S. C. § 411.[2] *Pointer* v. *United States*, 151 U. S. 396. A state law creating an unlawful qualification, however, is not binding and should not be utilized in selecting federal jurors. See *Kie* v. *United States*, 27 F. 351, 357.

The undisputed evidence in this case demonstrates a failure to abide by the proper rules and principles of jury selection. Both the clerk of the court and the jury commissioner testified that they deliberately and intentionally excluded from the jury lists all persons who work for a daily wage. They generally used the city directory as the source of names of prospective jurors. In the words of the clerk, "If I see in the directory the name of John Jones and it says he is a longshoreman, I do not put his name in, because I have found by experience that that man will not serve as a juror, and I will not get people who will qualify. The minute that a juror is called into court on a venire and says he is working for $10 a day and cannot afford to work for four, the Judge has never made one of those men serve, and so in order to avoid putting names of people in who I know won't become jurors in the court, won't qualify as jurors in this court, I do leave them out. . . . Where I thought the designation indicated that they were day laborers, I mean they were people who were compensated solely when they were working by the day, I leave them out." The jury commissioner corroborated this testimony, adding that he purposely excluded "all the iron craft, bricklayers, carpenters, and machinists" because in the past "those men came into court and

[2] Federal statutes prohibit the service by any person as a petit juror "more than one term in a year," 28 U. S. C. § 423, exempt from jury service artificers and workmen employed in the armories and arsenals of the United States, 50 U. S. C. § 57, and set up disqualifications for service as a juryman or talesman "in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States," 28 U. S. C. § 426.

See, in general, Blume, "Jury Selection Analyzed: Proposed Revision of Federal System," 42 Mich. L. Rev. 831; Report to the Judicial Conference of Senior Circuit Judges of the United States of the Committee on Selection of Jurors (1942); Report of the Commission on the Administration of Justice in New York (1934).

offered that [financial hardship] as an excuse, and the judge usually let them go." The evidence indicated, however, that laborers who were paid weekly or monthly wages were placed on the jury lists, as well as the wives of daily wage earners.

It was further admitted that business men and their wives constituted at least 50% of the jury lists, although both the clerk and the commissioner denied that they consciously chose according to wealth or occupation. Thus the admitted discrimination was limited to those who worked for a daily wage, many of whom might suffer financial loss by serving on juries at the rate of $4 a day and would be excused for that reason.

This exclusion of all those who earn a daily wage cannot be justified by federal or state law. Certainly nothing in the federal statutes warrants such an exclusion. And the California statutes are equally devoid of justification for the practice. Under California law a daily wage earner may be fully competent as a juror. A juror, to be competent, need only be a citizen of the United States over the age of 21, a resident of the state and county for one year preceding selection, possessed of his natural faculties and of ordinary intelligence and not decrepit, and possessed of sufficient knowledge of the English language. California Code of Civil Procedure, § 198. Cf. § 199. Nor is a daily wage earner listed among those exempt from jury service. § 200. And under the state law, "A juror shall not be excused by a court for slight or trivial causes, or for hardship, or for inconvenience to said juror's business, but only when material injury or destruction to said juror's property or of property entrusted to said juror is threatened . . ." § 201.

Moreover, the general principles underlying proper jury selection clearly outlaw the exclusion practiced in this instance. Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid $3 a day may be as fully competent as one who is paid $30 a week or $300 a month. In other words, the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror. Wage earners, including those who are paid by the day, constitute a very substantial portion of the community,[3] a portion that can-

[3] In the San Francisco-Oakland industrial area in 1939 there were 76,374 wage earners employed by manufacturers out of a total population (as of 1940) of 1,412,686. Sixteenth Census of the United States: 1940, Manufactures 1939, Vol. III, p. 80.

not be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do.

It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship.[4] But that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved. Here there was no effort, no intention, to determine in advance which individual members of the daily wage earning class would suffer an undue hardship by serving on a jury at the rate of $4 a day. All were systematically and automatically excluded. In this connection it should be noted that the mere fact that a person earns more than $4 a day would not serve as an excuse. Jury service is a duty as well as a privilege of citizenship; it is a duty that cannot be shirked on a plea of inconvenience or decreased earning power. Only when the financial embarrassment is such as to impose a real burden and hardship does a valid excuse of this nature appear. Thus a blanket exclusion of all daily wage earners, however well-intentioned and however justified by prior actions of trial judges, must be counted among those tendencies which undermine and weaken the institution of jury trial. "That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties." *Glasser v. United States*, *supra*, 86.

It follows that we cannot sanction the method by which the jury panel was formed in this case. The trial court should have granted petitioner's motion to strike the panel. That conclusion requires

[4] See statement of Judge John C. Knox in Hearings before the House Committee on the Judiciary, 79th Cong., 1st Sess., on H. R. 3379, H. R. 3380 and H. R. 3381, Serial No. 3, June 12 and 13, 1945, p. 4. "When jurors' compensation is limited to $4 per day, and when their periods of service are often protracted, thousands upon thousands of persons simply cannot afford to serve. To require them to do so is nothing less than the imposition upon them of extreme hardship." *Id.*, p. 8.

us to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the federal courts. See *McNabb* v. *United States*, 318 U. S. 332, 340. On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class. See *Glasser* v. *United States*, *supra*; *Walter* v. *State*, 208 Ind. 231, 195 N. E. 268; *State ex rel. Passer* v. *County Board*, 171 Minn. 177, 213 N. W. 545. It is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the laboring class. The evil lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen.

*Reversed.*

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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Mr. Justice FRANKFURTER, with whom Mr. Justice REED concurs, dissenting.

This was a suit brought by the petitioner, a salesman, against the Southern Pacific Company for injuries suffered by him while a passenger on one of the Railroad's trains, and attributed to the Company's negligence. The trial was in the United States District Court sitting in San Francisco. The jury rendered a verdict against the petitioner. The District Court found no ground for setting it aside and entered judgment on the verdict. Upon full review of the trial, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment. 149 F. 2d 783. Thus, a verdict arrived at by a jury whose judgment on the merits the District Court has found unassailable, which the Circuit Court of Appeals has affirmed on the merits, and which this Court has refused to review on the merits, 327 U. S. —, is here nullified because of an abstract objection to the manner in which the district judges for the Northern District of California have heretofore generally discharged their duty, with the approval of the reviewing judges of the Ninth Circuit, to secure appropriate jury panels.

The process of justice must of course not be tainted by property prejudice any more than by race or religious prejudice. The task of guarding against such prejudice devolves upon the district judges, who have the primary responsibility for the selection of jurors, and the circuit judges, whose review of verdicts is normally final. It is embraced in the duty, formulated by the judicial oath, to "administer justice without respect to persons, and do equal right to the poor and to the rich . . . . " 1 Stat. 73, 76, 36 Stat. 1087, 1161; 28 U. S. C. § 372. But it is not suggested that the jury was selected so as to bring property prejudice into play in relation to this specific case or type of case, nor is there the basis for contending that the trial judge allowed the selective process to be manipulated in favor of the particular defendant. No such claim is now sustained. Neither is it claimed that the district judges for the Northern District of California, with the approval of the circuit judges, designed racial, religious, social, or economic discrimination to influence the makeup of jury panels, or that such unfair influence infused the selection of the panel, or was reflected in those who were chosen as jurors in this case. Nor is there any suggestion that the method of selecting the jury in this case was an innovation. What is challenged is a long standing practice adopted in order to deal with the special hardship which jury service entails for workers paid by the day. What is challenged, in short, is not a covert attempt to benefit the propertied but a practice designed, wisely or unwisely, to relieve the economically least secure from the financial burden which jury service involves under existing circumstances.

No constitutional issue is at stake. The problem is one of judicial administration. The sole question over which the Court divides is whether the established practice in the Northern District of California not to call for jury duty those otherwise qualified but dependent on a daily wage for their livelihood requires reversal of a judgment which is inherently without flaw.

Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. Since the color of a man's skin is unrelated to his fitness as a juror, negroes cannot be excluded from jury service because they are negroes. *E. g., Carter* v. *Texas*, 117 U. S. 442. A group may be excluded for reasons that are relevant not to their fitness but to competing considerations of public interest, as is true of the exclusion of doctors, ministers, lawyers, and the like. *Raw-*

*lins* v. *Georgia*, 201 U. S. 638. But the broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility. See *Smith* v. *Texas*, 311 U. S. 128, 130.

Obviously these accepted general considerations must have much leeway in application. In the abstract the Court acknowledges this. "The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers." Congress has made few inroads upon this discretion. Its chief enactment underlines the importance of avoiding rigidities in the jury system and recognizes that ample play must be allowed the joints of the machinery. The First Judiciary Act adopted for the federal courts the qualifications and exemptions, with all their diversities, prevailing in the States where the federal courts sit. 1 Stat. 73, 88. That has remained the law. 36 Stat. 1087, 1164; 28 U. S. C. § 411. (For a collection of federal statutes regulating the composition and selection of jurors, see 37 Harv. L. Rev. 1010, 1098-1100.) We would hardly have taken this case to consider whether the federal court in San Francisco deviated from the requirements of California law, and nothing turns on that here. But it is not without illumination that under California law all those belonging to this long string of occupations are exempted from jury service: judicial, civil, naval, and military officers of the United States or California; local government officials; attorneys, their clerks, secretaries, and stenographers; ministers; teachers; physicians, dentists, chiropodists, optometrists, and druggists; officers, keepers, and attendants at hospitals or other charitable institutions; officers in attendance at prisons and jails; employees on boats and ships in navigable waters; express agents, mail carriers, employees of telephone and telegraph companies; keepers of ferries or tollgates; national guardsmen and firemen; superintendents, engineers, firemen, brakemen, motormen, or conductors of railroads; practitioners treating the sick by prayer. *California Code of Civil Procedure*, § 200.

Placed in its proper framework the question now before us comes to this: Have the district judges for the Northern District of California, supported by the circuit judges of the Ninth Circuit, abused their discretion in sanctioning a practice of not calling for jury duty those who are dependent upon a daily wage for their livelihood?

The precise issue must be freed from all atmospheric innuendoes. Not to do so is unfair to the administration of justice, which should be the touchstone for the disposition of the judgment under challenge, and no less unfair to a group of judges of long experience and tested fidelity. If workmen were systematically not drawn for the jury, the practice would be indefensible. But concern over discrimination against wage earners must be put out of the reckoning. Concededly those who are paid weekly or monthly wages were placed on the jury lists. And that no line was drawn against the wage earners because they were wage earners, and that there was merely anticipatory excuse of daily wage earners, is conclusively established by the fact that the wives of such daily wage earners were included in the jury lists. As to any claim of the operation of a designed economic bias in the method of selecting the juries, the Circuit Court of Appeals rightly found "no evidence that the persons whose names were in the box, or the persons whose names were drawn therefrom and who thus became members of the panel, were 'mostly business executives or those having the employer's viewpoint'." 149 F. 2d 783, 786.

"When the question is narrowed to its proper form the answer does not need much discussion.' The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen or to make them act otherwise than those who were drawn would act. The exclusion was not the result of race or class prejudice. It does not even appear that any of the defendants belonged to any of the excluded classes. The ground of omission no doubt was that pointed out by the state court, that the business of the persons omitted was such that either they would have been entitled to claim exemption or that probably they would have been excused." So this Court speaking through Mr. Justice Holmes answered a related question in *Rawlins* v. *Georgia*, 201 U. S. 638, 640. And the justification for the answer applies to the present situation.

It is difficult to believe that this judgment would have been reversed if the trial judge had excused, one by one, all those wage earners whom the jury commissioner, acting on the practice of trial judges of San Francisco, excluded. For it will hardly be contended that the absence of such daily wage earners from the jury panel removed a group who would act otherwise than work-

ers paid by the week or the wives of the daily wage earners themselves. The exclusion of the daily wage earners does not remove a group who would, in the language of Mr. Justice Holmes, "act otherwise than those who are drawn would act." Judged by the trend of census statistics, laborers paid by the day are not a predominant portion of the workers of the country. See Sixteenth Census of the United States, 1940, Population, Vol. III, The Labor Force, Part 2, pp. 290 *et seq.* It certainly is too large an assumption on which to base judicial action that those workers who are paid by the day have a different outlook psychologically and economically than those who earn weekly wages. In the language of Mr. Chief Justice Hughes, "Impartiality is not a technical conception. It is a state of mind." *United States* v. *Wood*, 299 U. S. 123, 145. And American society is happily not so fragmentized that those who get paid by the day adopt a different social outlook, have a different sense of justice, and a different conception of a juror's responsibility than their fellow workers paid by the week. No doubt the insecurities of a system of daily earnings, or generally of wages on less than an annual basis, raise serious problems as does, of course, also the question of guaranteed wage plans. See the letter of President Roosevelt to the Director of War Mobilization, James F. Byrnes, on the date of March 20, 1945, carrying out the suggestion of a report to the President by the War Labor Board for the creation of a Commission to study the question of guaranteed wage plans. And see *Basic Steel Case*, 19 W. L. B. 568, 653 *et seq.*; N. W. L. B. Research and Statistics Report No. 25, Guaranteed Employment and Annual Wage Plans (1944). But these are matters quite irrelevant to the problem confronting district judges in dealing with the present plight of daily wage earners when called to serve as jurors and the power of the judges, as a matter of discretion, to excuse such daily wage earners from duty.

For it cannot be denied that jury service by persons dependent upon a daily wage imposes a very real burden. Judge John C. Knox, Senior District Judge of the Southern District of New York, thus described the problem:

> " . . . when jurors' compensation is limited to $4 per day and when their periods of service are often protracted, thousands upon thousands of persons simply cannot afford to serve. To require them to do so is nothing less than the imposition on them of extreme hardship.

"With respect to the item last-mentioned, it is easy to say that jury duty should be regarded as a patriotic service, and that all public-spirited persons should willingly sacrifice pecuniary rewards in the performance of an obligation of citizenship. With that statement I am in full accord; but it does not solve the difficulty. Adequate provision for one's family is the first consideration of most men. And if, with this thought predominant in a man's mind, he is required to perform a public service that means a default of an insurance premium, the sacrifice of a suit of clothes, or the loss of his job, he will entertain feelings of resentment that will be anything but conducive to the rendition of justice. In other words, persons with a grievance against the Government or who serve under conditions that expose them to self-denial are not likely to have the spiritual contentment and mental detachment that good jurors require." Hearings before H. R. Committee on the Judiciary on H. R. 3379, H. R. 3380, H. R. 3381, 79th Cong., 1st Sess. (1945) 8.

No doubt, in view of the changes in the composition and distribution of our population and the growth of metropolitan areas, a reexamination is due of the operation of the jury system in the federal courts. Just as the federal judicial system has been reorganized and administratively modified through a series of recent enactments (see Act of September 14, 1922, 42 Stat. 837, 838, 28 U. S. C. §§ 218 *et seq.*; Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. §§ 41 *et seq.*; Act of August 7, 1939, 53 Stat. 1223, 28 U. S. C. §§ 444 *et seq.*), the jury system, that indispensable adjunct of the federal courts, calls for review to meet modern conditions. The object is to devise a system that is fairly representative of our variegated population, exacts the obligation of citizenship to share in the administration of justice without operating too harshly upon any section of the community, and is duly regardful of the public interest in matters outside the jury system. This means that the many factors entering into the manner of selection, with appropriate qualifications and exemptions, the length of service and the basis of compensation must be properly balanced. These are essentially problems in administration calling for appropriate standards flexibly adjusted.

Wise answers preclude treatment by rigid legislation or rigid administration. Congress has devised the appropriate procedure and instrument for making these difficult and delicate adjustments by its creation, in 1922, of the Conference of Senior Circuit

Judges. The Conference, under the presidency of the Chief Justice of the United States, is charged with the duty of continuous oversight of the actual workings of the federal judicial system and of meeting disclosed needs, either through practices formulated by the Conference, or, when legislation is necessary or upon appropriate, through proposals submitted to Congress. See 40 Harv. L. Rev. 431. That is precisely the course that has been followed in regard to the inadequacies in the operation of the federal jury system. In September, 1941, the late Chief Justice brought the matter before the Conference. As a result, Mr. Chief Justice Stone appointed a committee of experienced district judges, see Report of the Judicial Conference (1941) 16, under the chairmanship of Judge Knox who, because of the length and richness of his experience in the busiest district of the country, brought unusual equipment for devising appropriate reforms. In September, 1942, the Committee reported, Report to the Judicial Conference of the Committee on Selection of Jurors (1942) 1, and submitted proposals for legislation. *Id.* at 44, 62, 107. Bills to carry out these recommendations were introduced in the Senate on January 11, 1944, S. 1623, 1624, 1625, 78th Cong., 2d Sess., and in the House on June 5, 1945, H. R. 3379, 3380, 3381, 79th Cong., 1st Sess. Hearings were had upon the House Bills on June 12 and 13, 1945, and action on them is now pending.

The Court now deals by adjudication with one phase of an organic problem and does so by nullifying a judgment which, on the record, was wholly unaffected by difficulties inherent in a situation that calls for comprehensive treatment, both legislative and administrative. If it be suggested that until there is legislation this decision will be the means of encouraging the district judges to uncover a better answer than they have thus far given to a lively problem, an appropriate admonition from the Court would accomplish the same result, or common action regarding the practice now under review may be secured from the Conference of Senior Circuit Judges. To reverse a judgment free from intrinsic infirmity and perhaps to put in question other judgments based on verdicts that resulted from the same method of selecting juries, reminds too much of burning the barn in order to roast the pig.

I would affirm the judgment.